91-860

No.

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,
APPELLANTS

v.

STATE OF MONTANA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

Article I, Section 2, Clause 3 of the United States Constitution provides that Representatives in the United States House of Representatives "shall be apportioned among the several States which may be included within this Union, according to their respective Numbers." Section 2 of the Fourteenth Amendment reiterates that requirement. The questions presented by this case are:

1. Whether Congress's choice among alternative means of apportioning Representatives that are rationally tied to the respective populations of the States is subject to review by a court.

2. Whether 2 U.S.C. 2a, which provides for apportionment of Representatives on the basis of the mathematical formula known as the "method of equal proportions," satisfies the requirement that Representatives be apportioned among the States "according to their respective Numbers."

PARTIES TO THE PROCEEDINGS

The appellants here, who were defendants in the district court, are the United States Department of Commerce; Robert A. Mosbacher, Secretary of Commerce; the Bureau of the Census; and Barbara Everitt Bryant, Director of the Bureau of the Census. Donnald K. Anderson, Clerk of the United States House of Representatives, also was a defendant in the district court and has filed a separate notice of appeal to this Court.

The appellees in this Court, who were the plaintiffs below, are the State of Montana; Stan Stephens, Governor of Montana; Marc Racicot, Attorney General of Montana; Mike Cooney, Secretary of State of Montana; Max Baucus and Conrad Burns, United States Senators from Montana; and Pat Williams and Ron Marlenee, United States Representatives from Montana.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the three-judge district court (App., *infra*, 1a-34a) and the order of the single judge (App., *infra*, 35a-46a) are not yet reported.

JURISDICTION

The judgment of the three-judge district court (App., *infra*, 47a-48a) was entered on October 18, 1991. The notice of direct appeal (App., *infra*, 49a-51a) was filed on October 24, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1253. See pages 25-28, *infra*.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 2, Clauses 1 through 3, and Section 8, Clause 18 of the United States Constitution; Sections 2 and 5 of the Fourteenth Amendment to the Constitution;

2 U.S.C. 2a; 13 U.S.C. 141(a) and (b); and 28 U.S.C. 1253 and 2284(a) are reproduced at App., *infra*, 54a-59a.

STATEMENT

The district court in this case held unconstitutional the Act of Congress that prescribes the method for apportioning Representatives among the States. 2 U.S.C. 2a(a). That statute was enacted in 1941 to resolve a 150-year-old controversy about the most appropriate formula for apportioning Representatives, and it has governed apportionment of the House of Representatives ever since. The Act mandates that Representatives be apportioned by what is known as the "method of equal proportions," which utilizes a formula based on geometric means—a familiar approach in statistical analysis. That method, and the four alternatives considered at the time (including the "Adams method" and "Dean method" advocated by appellees), are described at pages 5-11, *infra*. Compared to each of those alternatives, the method of equal proportions minimizes the relative differences in a comparison between any two States with respect to both (1) the number of persons represented by a Representative (*i.e.*, the average population of congressional districts), and (2) each person's "share" of a Representative (*i.e.*, the number of a State's Representatives divided by its population).

A. Constitutional, Statutory, And Historical Background

1. Article I of the Constitution provides that "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers"; "but each State shall have at Least one Representative," and the total "Number of Representatives shall not exceed one for every thirty Thousand" persons. Art. I, § 2, Cl. 3. The "actual Enumeration" of persons in the States must be made every ten years, "in such Manner as they [the

Congress] shall by Law direct." *Ibid.* Section 2 of the Fourteenth Amendment reiterates that "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State."[1] The Constitution does not expressly specify that it is Congress that shall make the apportionment, but Congress's power to do so "has always been acted upon as irresistibly flowing from the duty positively enjoined by the constitution." *Prigg* v. *Pennsylvania*, 41 U.S. (16 Pet.) 539, 619 (1842); see Art. I, § 8, Cl. 18; Amend. XIV, § 5. Similarly, because the Constitution does not prescribe the number of Representatives, that number likewise has been set by Congress; it was increased steadily from the 65 initially provided for in the Constitution (Art. I, § 2, Cl. 3) to the current total of 435, which was adopted in 1911.

Pursuant to Article I, Section 2 of the Constitution, Congress has directed the Secretary of Commerce to conduct a census, as of April 1 of 1980 and every tenth year thereafter, "in such form and content as he may determine." 13 U.S.C. 141(a). The tabulations required for apportionment "shall be completed within 9 months after the census date and reported by the Secretary to the President of the United States." 13 U.S.C. 141(b). The President, in turn, must transmit to Congress, during the first week of its next Session, "a statement showing the whole number of persons in each State," as ascertained by the census. 2 U.S.C. 2a(a). The President's statement must also show "the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions, no

[1] Article I, Section 2 provides that the number of persons "shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other persons." This provision was superseded by Section 2 of the Fourteenth Amendment, except that the latter likewise excludes "Indians not taxed."

State to receive less than one Member." *Ibid.* The apportionment statute further provides that "[e]ach State shall be entitled * * * to the number of Representatives shown in the [President's] statement required by [2 U.S.C. 2a(a)]," and it directs the Clerk of the House of Representatives, within 15 days after receipt of the statement, to "send to the executive of each State a certificate of the number of Representatives to which such State is entitled under this section." 2 U.S.C. 2a(b).[2]

2. Congress adopted the "method of equal proportions" in 1941 in order to resolve a political controversy, as old as the Constitution itself, regarding the appropriate means of implementing the general constitutional mandate that Representatives be apportioned according to the population of the States. A precise mathematical apportionment of any given number of Representatives would almost invariably result in a whole number of Representatives for each State, plus a fractional remainder.[3] The Constitution, however, renders any such precise apportionment impossible, by virtue of its explicit requirement that each State have at least one Representative, and the implicit assumption that each State must be allotted a whole number of Representatives. App., *infra*, 9a, 15a n.4; *id.* at 23a, 24a-25a (O'Scannlain, J., dissenting).[4]

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[2] The Representatives allotted to each State must be elected from single-member districts. 2 U.S.C. 2a(c), 2c.

[3] The precise number of Representatives for each State may be calculated by dividing its population by the total population of all the States, and then multiplying the resulting quotient by 435 (the total number of Representatives under current law). Using the population totals from the 1990 census, that calculation yields exact quotas ranging from a high of 52.124 Representatives for California to a low of 0.797 Representatives for Wyoming. Exh. B to Decl. of Lawrence R. Ernst, Assistant Chief, Statistical Research Division, Bureau of the Census (submitted in support of appellants' motion for summary judgment).

[4] Thus, States do not have fractional Representatives in the House, and two or more States do not share a Representative (*e.g.*, by drawing congressional districts to cross state lines).

Congress therefore must devise some way of addressing the phenomenon of fractional remainders when it apportions Representatives.

a. In the decades following adoption of the Constitution, Congress enacted a new apportionment act after each decennial census. In those acts, Congress allocated Representatives by selecting a uniform (albeit arbitrary) number of persons to be represented by each Representative, and then dividing that figure into each State's population. Through the 1832 apportionment, any fractional remainders were simply disregarded.[5] This method is known as the "Jefferson method" (because it was endorsed by Thomas Jefferson at the time of the first apportionment in 1792), or the "method of greatest divisors." M. Balinski & H.P. Young, *Fair Representation* 10-22 (1982); L. Schmeckebier, *Congressional Apportionment* 73, 107-114 (1941); see page 9, *infra*. In 1842, Congress again apportioned Representatives based on a specified ratio of persons per Representative; but for the first time it also took account of some fractional remainders by allocating "one additional representative for each State having a fraction greater than one moiety [one half] of the said ratio." Act of June 25, 1842, 5 Stat. 491. This method is known as the "Webster method" (because it was endorsed by Senator Daniel Webster), or the "method of major fractions." *Fair Representation* at 28-35; *Congressional Apportionment* at 112-113.

These early apportionment acts (like later ones) generated extended debates about the most appropriate way of apportioning Representatives. The debates were often characterized by disputes between large and small States, between North and South, between political factions—and, of course, between States that stood to gain or lose

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[5] Act of Apr. 14, 1792, 1 Stat. 253 (one Representative per 33,000 persons); Act of June 14, 1802, 2 Stat. 128 (33,000); Act of Dec. 21, 1811, 2 Stat. 669 (35,000); Act of Mar. 7, 1822, 3 Stat. 651 (40,000); Act of May 22, 1832, 4 Stat. 516 (47,700).

under various alternative methods of apportionment, in light of the most recent decennial census.[6]

b. In the Census Act of 1850, Congress adopted a new apportionment method, known as the "Vinton method," which allocated additional Representatives to the States having the largest fractional remainders. Act of May 23, 1850, § 25, 9 Stat. 432-433. The Vinton method formally remained on the statute books into the twentieth century. But Congress soon became disenchanted with it because it gave rise to what became known as the "Alabama paradox," a mathematical quirk that can result in a State's actually receiving *fewer* Representatives for a given population if the nationwide total number of Representatives is *increased*. Congress therefore effectively abandoned the Vinton method by allocating Representatives beyond the number that method would have yielded for certain States in 1862 and 1872,[7] and by selecting a

[6] For example, the Apportionment Act of 1792, which employed the Jefferson method, favored Virginia and other large States. It was preceded by passage of another bill that was the subject of the first Presidential veto. The vetoed bill, endorsed by Alexander Hamilton, was thought to favor northern States; it apportioned Representatives according to the whole number of Representatives to which each State was entitled under a specified ratio of persons per Representative, plus an additional Representative for the States having the largest fractional remainders. *Fair Representation* at 10-22. Although it was not adopted in 1792, that approach (known as the "Vinton method" or "Hamilton/Vinton method") was enacted by Congress in 1852, only to be abandoned some years later. See pages 6-7, *infra*. In 1832, John Quincy Adams, then the Speaker of the House, proposed yet another method (the "Adams method" or the "method of smallest divisors"), under which every State would receive an additional Representative for its fractional remainder (no matter how small). The Adams method, which favored New England States in 1832, was the mirror image of the Jefferson method, which disregarded all fractional remainders (no matter how large) and favored southern States in that year. *Fair Representation* at 27-29.

[7] See Act of Mar. 4, 1862, 12 Stat. 353; Act of Feb. 2, 1872, 12 Stat. 28; Act of May 30, 1872, 17 Stat. 192.

total number of Representatives following the 1880 and 1890 censuses that would produce the same apportionment under both the Vinton and Webster methods. *Fair Representation* at 37-42; *Congressional Apportionment* at 113-120; Celler, *Congressional Apportionment—Past, Present, and Future*, 17 Law & Contemp. Probs. 268, 270-271 (1953). In 1911, Congress formally abandoned the Vinton method in favor of the Webster method, and fixed the number of Representatives at the current total of 435. Act of Aug. 8, 1911, 37 Stat. 13.[8]

c. Following the 1920 census, Congress failed for the first time to pass any apportionment act, because of concerns about the accuracy of the census, dramatic population shifts, and dissatisfaction with the Webster method. After the matter remained unresolved throughout most of the 1920s—and to avoid future deadlocks—the Speaker of the House requested the National Academy of Sciences (NAS) to review various methods of apportionment. The NAS appointed a committee of four prominent mathematicians for that purpose. *Fair Representation* at 51-55; *Congressional Apportionment* at 120-121; Celler, 17 Law & Contemp. Probs. at 271; App., *infra*, 21a (O'Scannlain, J. dissenting).

The NAS committee considered five methods of apportionment: (1) equal proportions (also known as the Hill method), (2) harmonic means (also known as the Dean method), (3) major fractions (Webster), (4) smallest divisors (Adams), and (5) greatest divisors (Jefferson).[9]

[8] The 1911 Act fixed the total number of Representatives at 433 but provided that additional Representatives would be allocated to Arizona and New Mexico if (as happened the next year) they were admitted to the Union. § 2, 37 Stat. 14. The number of Representatives was temporarily increased to 437 following the admission of Alaska and Hawaii in 1959, but it reverted to 435 following the 1960 census. See Alaska Statehood Act § 9, 72 Stat. 345; Hawaii Statehood Act, § 8, 73 Stat. 8.

[9] The NAS committee did not consider the Vinton method, because it had been discredited by its propensity to create the "Alabama paradox." *Fair Representation* at 55.

Although these methods may be described in various ways as a practical matter, they may also be expressed mathematically in a form that permits comparison: Each State is first allotted one Representative, as required by the Constitution. A series of priority values is then calculated for each State, from which its entitlement to a second and subsequent Representatives can be determined. The priority values for all States are then arranged in sequence from highest to lowest, to indicate which State should receive the 51st Representative, which State the 52d, and so on through the 435th Representative. Under all of the methods, the formula for establishing each State's priorities has as its numerator the population of the State. The methods differ only with respect to the denominator.

For example, under the method of equal proportions, the priority values for each State are calculated by dividing its population (SP) by the *geometric* mean of the number of Representatives the State has already received in the sequential allocation ("n") and the next integer ("n+1"). The resulting formula is:

$$\frac{SP}{\sqrt{n(n+1)}}$$

Under the major fractions (Webster) method, a State's priority values are calculated by dividing its population by the *arithmetic* mean between successive Representatives in the allocation, as depicted by the formula:

$$\frac{SP}{n+\frac{1}{2}}$$

Under the harmonic means (Dean) method, urged by appellees below, the State's population is divided by the *harmonic* mean between successive Representatives in the allocation, as depicted by the formula:

$$\frac{SP}{\frac{2n(n+1)}{n+(n+1)}}$$

The smallest divisors (Adams) method, also urged by appellees below, was designed in theory to round up all fractional remainders, and is depicted by the formula:

$$\frac{SP}{n}$$

The greatest divisors (Jefferson) method, by contrast, was designed in theory to round down all fractional remainders, and is depicted by the formula:

$$\frac{SP}{n+1}$$

See *Fair Representation* at 14, 22-23, 33-34, 41, 50; App., *infra*, 27a-28a (O'Scannlain, J., dissenting).

In evaluating these five methods, the NAS committee utilized four measures of equity:

1) *Persons per Representative* (average district size)—the State's population divided by its number of Representatives.

2) *Each person's share of a Representative*—the number of a State's Representatives divided by its population.

3) *Representation surplus*—the difference between (i) the number of Representatives of an over-represented State, and (ii) the number of Representatives of an under-represented State multiplied by the population of the over-represented State divided by the population of the under-represented State.

4) *Representation deficiency*—the difference between (i) the number of Representatives of an under-represented State, and (ii) the number of Representatives of an over-represented State multiplied by the population of the under-represented State divided by the population of the over-represented State.

The NAS committee concluded that four of the apportionment methods it considered best achieved one of these measures of equity in absolute terms. Thus, in a comparison between any two States, the harmonic means (Dean) method minimizes the absolute difference between the number of persons per representative; the

major fractions (Webster) method minimizes the absolute difference between each person's share of a representative; the smallest divisors (Adams) method minimizes the absolute representation surplus; and the greatest divisors (Jefferson) method minimizes the absolute representation deficiency. However, the equal proportions method minimizes the *relative* (percentage) variation of both the number of persons per Representative *and* each person's share of a Representative. For this reason, and because "it occupies mathematically a neutral position with respect to emphasis on larger and smaller states," the NAS committee recommended adoption of the method of equal proportions. G.A. Bliss, *et al.*, *Report to the President of the National Academy of Sciences* 3 (1929) (reproduced in H.R. Rep. No. 1314, 91st Cong., 2d Sess. 21 (1970)); see Ernst Decl. 4-7.

Following receipt of the NAS Report, Congress enacted permanent apportionment legislation as part of the Census Act of 1929. Act of June 18, 1929, § 22, 46 Stat. 26-27. The 1929 Act directed the President, following every decennial census, to report to Congress the number of Representatives to which each State would be entitled under the method of equal proportions, the method of major fractions, and the method used in the preceding apportionment; if Congress did not enact an apportionment law before the end of the Session, each State would be entitled to the number of Representatives it would receive under the method used in the prior apportionment. § 22, 46 Stat. 26-27. When Congress did not enact an apportionment law following the 1930 census, Representatives were apportioned according to the method of major fractions (which was used in 1911), although the method of equal proportions would have resulted in the same apportionment. *Congressional Apportionment* at 120-124. Finally, in 1941, Congress amended the 1929 Act to provide that Representatives are to be automatically apportioned under the method of equal proportions, in the manner now prescribed by 2 U.S.C. 2a. Act of Nov. 15, 1941, 55 Stat. 762. The method of equal proportions has been the basis for all reapportionments ever since. *Fair Representation* at 58.

d. Although Congress has not revised the apportionment formula since 1941, it has revisited the issue on several occasions. Most notably, in 1948, Congress requested the NAS to re-examine the various apportionment methods. In response, "[t]hree of the most distinguished mathematicians of the day" concurred with the 1929 NAS report in endorsing the method of equal proportions. *Fair Representation* at 78. They found not only that the equal proportions method minimizes the relative difference between persons per Representative and Representatives per person in pair-wise comparisons of the States, but also that it is superior to each alternative under three out of four measures of absolute and relative equity. See M. Morse, *et al.*, *Report to the President of the National Academy of Sciences* 4 (1948).[10]

B. The Proceedings In This Case

1. Following the 1990 census, the President, on January 3, 1991, transmitted to Congress the statement required by 2 U.S.C. 2a(a). Based on the 1990 census, Montana's percentage of the national population translated into 1.404 Representatives out of the fixed total of 435. Under the method of equal proportions, Montana was entitled to one Representative, a loss of one.

On May 22, 1991, appellees (the State of Montana and its Governor, Attorney General, Secretary of State, Senators, and Representatives) commenced this suit for declaratory and injunctive relief against the Department and

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[10] In 1970, the responsible House Committee reported that the equal proportions method best implements the Constitution, noting that it was adopted in 1941 "after a century and a half of experimentation, studies, and constitutional debates." H.R. Rep. No. 1314, 91st Cong., 2d Sess. 5-6 (1970). In 1981, the House considered a bill that would have reinstituted the Vinton method. *Census Activities and the Decennial Census: Hearing on H.R. 1990 Before the Subcomm. on Census and Population of the House Comm. on Post Office and Civil Service*, 97th Cong., 1st Sess. (1981).

Secretary of Commerce, the Bureau of the Census and its Director, and the Clerk of the House of Representatives. Appellees alleged that use of the equal proportions method to apportion Representatives contravenes Article I, Section 2 of the Constitution, and they urged adoption of the harmonic means (Dean) method or the smallest divisors (Adams) method, neither of which had ever been previously utilized. Under the Dean method, Montana would receive two Representatives rather than one, while Washington would receive eight rather than nine; no other State's allocation would be affected. The Adams method, however, would alter the allocations of 18 States. Ernst Decl., Exh. B.

2. On October 18, 1991, a divided three-judge district court declared 2 U.S.C. 2a "unconstitutional and void" and permanently enjoined the defendants "and their agents * * * from effecting reapportionment of the United States House of Representatives under [2 U.S.C. 2a]." App., *infra*, 35a-36a; *id.* at 1a-34a.[11]

a. The court recognized that "[n]o state has heretofore turned to the judicial branch to challenge the method employed by Congress to apportion representatives among the several states." App., *infra*, 9a. It also recognized that strict application of the "one person, one vote" principle is a "mathematical impossibility" in this setting, "because Congress must adhere to existing state boundaries and each state must have at least one representative." *Ibid.* But the court concluded that that principle nevertheless should govern to the extent practicable, and

[11] As an initial matter, the three-judge court held that it was properly convened under 28 U.S.C. 2284, and it rejected appellants' contentions that the case presents a nonjusticiable political question and that appellees lack standing. App., *infra*, 4a-5a. On the latter point, the court concluded that the alleged injury to appellees' voting power can be traced to use of the equal proportions method and that "there is a substantial likelihood that the injury will be redressed if Congress is forced to adopt a constitutional method." *Id.* at 5a. Judge O'Scannlain agreed with the majority on these threshold issues. *Id.* at 20a. Judge Lovell previously had denied appellants' motion to dismiss on standing and political question grounds. *Id.* at 35a-46a.

that the reasoning of *Wesberry* v. *Sanders*, 376 U.S. 1 (1964), and *Karcher* v. *Daggett*, 462 U.S. 725 (1983)—which concerned a state legislature's drawing of congressional districts within a State—should also apply to Congress's apportionment of Representatives among the States. App., *infra*, 9a-12a. In the lower court's view, if the party challenging such an apportionment "establishes 'that the population differences were not the result of a good-faith effort to achieve equality,' the burden then shifts to the defendant to prove 'that each significant variance between districts was necessary to achieve some legitimate goal.'" *Id.* at 13a (quoting *Karcher*, 462 U.S. at 730-731).

Applying those principles here, the court agreed with appellees that Congress must adopt the apportionment method that minimizes the "*absolute* difference between numbers of persons per representative" and the absolute variance from the "ideal district size" (the nationwide average district size), rather than the "*relative* difference between the number of persons per representative and the relative difference between each person's share of a representative" (as the equal proportions method does). App., *infra*, 13a-15a. Finding that the Dean method satisfies those standards, the court concluded that appellees had carried their initial burden of showing that a method other than equal proportions would "more closely meet" what it regarded as "the constitutional mandate of absolute population equality among districts." *Id.* at 15a.[12]

The court next held that appellants had not carried their resulting burden of affirmatively justifying the equal proportions method in these circumstances, App.,

[12] The court rejected appellees' reliance on the Adams method, because, as the dissent explained, it results in a "quota violation" for four States, App., *infra*, 15a n.5—*i.e.*, "it assigns a number of representatives to a state that is neither of the two closest whole numbers to that state's exact, unrounded share of representation," *id.* at 28a (O'Scannlain, J., dissenting). For example, although California's exact share of Representatives under the 1990 census is 52.124, the Adams method allocates only 50 Representatives to California. *Ibid.*

infra, 15a-19a, expressing the view that it would be "difficult, if not impossible, to do so." *Id.* at 17a. Thus, the court discounted Congress's judgment that relative difference is a better measure of equity than absolute difference, on the ground that it was made "without benefit" of *Wesberry*. *Id.* at 16a.[13] And it rejected appellants' contention that the equal proportions method is justified by mathematically demonstrable considerations of equity and fairness, observing that apportionment is not governed by "subjective mathematical or equitable concerns," and that "[t]he Constitution mandates apportionment 'among the several States . . . according to their respective Numbers,' not 'according to their respective Numbers and whatever other considerations Congress or its mathematicians may deem appropriate at any given time.'" *Id.* at 17a.

Finally, the court held that Congress had not made a "good faith effort" to achieve equal representation for equal numbers of people, "because the reapportionment process was automatic, and Congress, in its role as law and policy maker, had no part in the process." App., *infra*, 18a. In the court's view, it would not be an "undue burden" for Congress, "once every decade, [to] apply various accepted statistical methods to the census results and determine which method best meets the Constitutional mandate for population equality among the districts." *Id.* at 18a-19a.[14]

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[13] The court also discounted Congress's reapportionment efforts on the ground that they "have been political in nature, involving compromises among the states." App., *infra*, 16a-17a.

[14] The appellee Members of Congress also alleged that 2 U.S.C. 2a is unconstitutional because its self-executing feature deprived them of the right to vote on an apportionment act after the 1990 census. The court held that the congressional appellees have standing to press that claim, App., *infra*, 5a, but did not resolve the claim on the merits because it held 2 U.S.C. 2a(a) unconstitutional for the reasons discussed in the text. App., *infra*, 18a n.9, 19a. Judge O'Scannlain agreed with the majority that the congressional appellees have standing to raise this claim, but he believed that it presents a nonjusticiable political question because it concerns the internal organization and processes of Congress. *Id.* at 20a & n.1. We disagree with the district court that Members of Congress have standing to present such a claim (an issue similar to that raised but not decided in *Burke* v. *Barnes*, 479 U.S. 361, 362-363 (1986)), and we share Judge O'Scannlain's broader concerns about the justiciability of the claim here. Although these issues are not raised on this appeal at the present time, they would be presented if the congressional appellees urged this claim as an alternative ground for affirmance or sought a remand to allow the district court to consider it.

b. Circuit Judge O'Scannlain dissented from the majority's holding that 2 U.S.C. 2a is unconstitutional. App., *infra*, 20a-34a. Judge O'Scannlain pointed out that "the Framers were aware that the scheme they were creating would lead to the fractional interest problem," yet "did not include in the Constitution a specific mathematical formula to address" it. *Id.* at 25a. In his view, appellees had failed to carry their burden of showing that the population differences under the formula Congress chose are avoidable, and that they result from a lack of good faith effort by Congress to achieve population equity in the context of the constitutional provisions requiring each State to have at least one Representative and barring congressional districts that straddle state lines. *Id.* at 26a. Because of these restrictions, Judge O'Scannlain reasoned, the standard of "precise numerical equality" announced in *Wesberry* and *Karcher* is "impossible to apply here." *Id.* at 26a-27a. "Indeed," he continued, "application of any of the apportionment formulae before [the] court results in congressional district populations varying by hundreds of thousands of people between states." *Id.* at 27a. Thus, unlike intrastate redistricting, which involves the straightforward question of whether districts have the same population, apportionment among the States entails "the more complex task of evaluating the relative merits of plans which, by necessity, all fall far short of population equality." *Ibid.*

Judge O'Scannlain also disagreed with the majority's conclusion that the Dean method is statistically superior to the equal proportions method. He first noted that

under the equal proportions method, "Montana's [single] congressional district is 48.0% larger than Washington's average district," but that under the Dean method, which would require the transfer of a House seat from Washington to Montana, Washington's districts would become 52.1% larger than Montana's. App., *infra*, 29a. Next, Judge O'Scanlain pointed out that the equal proportions method performs better even under the majority's preferred test of "absolute difference from the ideal district," because in both Montana and Washington, the aggregate deviation of all districts from the ideal district size is smaller under the equal proportions method than under the Dean method. *Ibid.* Finally, Judge O'Scannlain noted that although the Dean method results in a narrower absolute difference between the single smallest district and single largest district in the Nation, "[w]hen all 435 districts are considered, the [equal proportions] method has the *least absolute population variance* from the ideal district size." *Id.* at 30a (citing Ernst Decl. 13).

THE QUESTION IS SUBSTANTIAL

The district court has held unconstitutional the Act of Congress that establishes a permanent formula for apportioning Representatives among the States following each decennial census. 2 U.S.C. 2a. Congress enacted that provision in 1941 after a century and a half of experimentation, studies, and debates regarding the most appropriate means of giving content to the general declaration in Article I, Section 2, Clause 3 of the Constitution that Representatives "shall be apportioned among the several States * * * according to their respective Numbers." The formula Congress chose—the method of equal proportions—was twice endorsed by a committee of experts who were charged with studying the apportionment question from a mathematical perspective, and it has produced a fair reapportionment of the House of Representatives following each decennial census since 1941, including this year.

The district court has now cast aside Congress's considered judgment, finding another method of apportion-

ment preferable under the single and inflexible test the court believed should control the implementation of Article I, Section 2. That ruling is unprecedented, for as the district court recognized, "[n]o state has heretofore turned to the judicial branch to challenge the method employed by Congress to apportion representatives among the several states." App., *infra*, 9a. The ruling below also is clearly wrong. The method of equal proportions unquestionably apportions Representatives among the States "according to their respective Numbers," which is all Article I, Section 2 requires. Nothing in that general phrase suggests that a court may second-guess Congress's rational choice among methods of apportionment tied to the population of the States, much less that the Constitution mandates use of the particular mathematical formula that appellees and the district court endorse.

The constitutional question presented by this case is one of paramount public importance regarding the structure of the Government. It warrants prompt resolution by this Court, because state legislatures are now in the process of redrawing congressional districts in reliance on the apportionment of Representatives made pursuant to 2 U.S.C. 2a, and because that apportionment also determines the number of Presidential electors to which the States will be entitled in the 1992 election.

1. a. The text of the Constitution refutes the district court's holding that Congress's power to select a means of apportioning Representatives among the States is strictly circumscribed, and that 2 U.S.C. 2a is invalid for that reason. The Constitution confers broad discretion on Congress in this respect and permits only the narrowest scope of judicial review.

Article I, Section 2, Clause 3 provides that Representatives shall be apportioned among the several States * * * according to their respective Numbers." See also Amend. XIV, § 2. Although the Constitution does not expressly provide that the responsibility for making the apportionment resides in Congress, its power to do so "has always been acted upon as irresistibly flowing from the duty posi-

tively enjoined by the Constitution." *Prigg* v. *Pennsylvania*, 41 U.S. (16 Pet.) at 619. Because the constitutional text furnishes no set formula for Congress to follow, the natural inference is that Congress may exercise the full measure of power vested in it by the Necessary and Proper Clause for "carrying into Execution" all powers vested by the Constitution in the Government of the United States. Art. I, § 8, Cl. 18; see *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 420-421 (1819). Thus, the authority to apportion Representatives is plenary, *Buckley* v. *Valeo*, 424 U.S. 1, 90, 132 (1976), and Congress may "select[] the policy which in its judgment best effectuates the constitutional aim." *Graham* v. *John Deere Co.*, 383 U.S. 1, 6 (1966). See also Amend. XIV, § 5.

It is significant as well that apportionment is integrally related to Congress's power to establish the total number of Representatives. The Constitution contains no restrictions on Congress's determination of a suitable size for the House of Representatives (beyond the requirements that each State have at least one Representative and that the total not exceed one for every 30,000 persons), and the history of the apportionment statutes discussed above shows that the number of Representatives has been reached through political compromise, typically in light of its impact on reapportionment. See pages 5-7, *supra*.[15] The fact that a question so basic to the structure of the Government as the size of the House of Representatives is left to the judgment of Congress strongly reinforces the conclusion that Congress likewise has broad discretion in apportioning whatever number of Representatives it chooses, so long as the allocation is reasonably tied to the population of the States.

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[15] See also *The Federalist*, No. 58 (New American Lib. Ed. 1961), at 358:

> The large States * * * will have nothing to do but to make reapportionments and augmentations mutually conditions of each other; and the senators from all the most growing States will be bound to contend for the latter, by the interest which their States will feel in the former.

This conclusion is still further reinforced by the fact that Article I, Section 2, Clause 3—by providing that the decennial census shall be made "in such Manner as they [the Congress] shall by Law direct"—commits the compilation of the data on which the apportionment is based to Congress's discretion.[16] Finally, the Constitution provides that each House is the judge of the election of its Members, Art. I, § 5, Cl. 1, which presents a political question beyond the jurisdiction of any court to resolve. *Roudebush* v. *Hartke*, 405 U.S. 15, 19 (1972).

In light of the Constitution's commitment of these subjects relating to the composition of the House of Representatives to the political Branches, a judicial decree striking down Congress's apportionment of Representatives is extraordinary. We do not argue that *all* matters concerning the apportionment of Representatives among the States present nonjusticiable political questions. For example, we may assume that if an Act of Congress apportioning Representatives was plainly contrary to an explicit textual limitation—*e.g.*, if no Representatives were assigned to a particular State, or if an apportionment entirely disregarded State populations—a court would not be barred from so ruling and granting appropriate relief, in a case that was otherwise properly before it.[17] But we do submit that the separation of powers on

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[16] See *Tucker* v. *Department of Commerce*, 135 F.R.D. 175 (N.D. Ill. 1991) (whether to adjust census for undercount presents nonjusticiable political question), appeal pending, No. 91-2051 (7th Cir.); but see *Carey* v. *Klutznick*, 637 F.2d 834 (2d Cir. 1980) (adjustment claim justiciable), stay granted, 449 U.S. 1068 (1980), followed on subsequent appeal, 653 F.2d 732, 737 (2d Cir. 1981); *City of New York* v. *United States Dep't of Commerce*, 713 F. Supp. 48, 53-54 (E.D.N.Y. 1989) (adjustment claim reviewable under arbitrary and capricious standard of Administrative Procedure Act).

[17] Compare *Powell* v. *McCormack*, 395 U.S. 486 (1969) (deciding that the qualifications of Representatives expressly set forth in Article I, Section 5, are exclusive).

which the political question doctrine rests, *Baker* v. *Carr*, 369 U.S. 186, 217 (1962), bars a court from setting aside Congress's selection of a particular method of apportionment that is not demonstrably contrary to such an explicit textual limitation on its discretion. *Coleman* v. *Miller*, 397 U.S. 433, 453-456 (1939); *United States* v. *Sprague*, 282 U.S. 716, 732 (1931); *Goldwater* v. *Carter*, 444 U.S. 996, 1003 (1979) (Rehnquist, J., concurring).

Here, the method of equal proportions mandated by 2 U.S.C. 2a is not demonstrably contrary to the express terms of Article I, Section 2. To the contrary, it unquestionably produces an apportionment of Representatives among the several States "according to their respective Numbers." As we have explained at pages 8-9, *supra*, each State's priorities under the equal proportions method are based on a formula in which the State's population is the numerator (and the denominator is the geometric mean between the number of Representatives the State has already received in the allocation and the next highest number). Furthermore, as Judge O'Scannlain pointed out, in every apportionment since the method of equal proportions was adopted in 1941, each State has been assigned one of the two whole numbers of Representatives closest to that State's exact, unrounded share. App., *infra*, 29a. Indeed, this year, the equal proportions method allocated to both Montana and Washington *the* closest whole number of Representatives: Montana's exact share is 1.404, and it received one Representative, while Washington's exact share is 8.538, and it received nine Representatives. Ernst Decl., Exh. B. Although the equal proportions method does not always round a State's fractional remainder up or down to the closest whole number in this manner, there is no textual basis whatever for appellees' and the district court's belief that Article I, Section 2 *requires* the *opposite* result here—*i.e.*, that Montana rather than Washington must receive an additional Representative this year, even though Washington has a higher fractional remainder.

b. The other apportionment methods that were studied by the NAS committees and were available to Congress in 1941 also apportion Representatives according to a formula in which the population of the State is the numerator. See pages 8-11, *supra*. Accordingly, we may assume for present purposes that those alternative methods also satisfy the general standard of Article I, Section 2, Clause 3 that Representatives be apportioned among the States "according to their respective Numbers." Congress in fact used several other methods in the past. Prior to 1842, under the Jefferson method, Congress simply disregarded fractional remainders. In 1842 and on several other occasions, Congress used the Webster method, which rounded fractional remainders to the nearest whole number. And in 1852 and several subsequent decades, Congress used the Vinton method, which allocated additional Representatives to the States having the highest fractional remainders. See pages 5-7, *supra*. But as Congress itself obviously concluded over the decades, nothing in Article I, Section 2, Clause 3 requires it to adopt any one of these alternatives (or the never-used Dean method), or to reject the equal proportions method it ultimately settled upon; there is, in other words, a "lack of judicially discoverable and manageable standards" on the question. *Baker* v. *Carr*, 369 U.S. at 217.

The district court nevertheless held that the Constitution requires Congress to enact an apportionment that comports with the single and inflexible standard of equity that it believed was appropriate—namely, one that minimizes the absolute difference in the size of the largest congressional district and the smallest congressional district in the Nation. But as between any two States, the equal proportions method minimizes the *relative* (percentage) difference between the number of persons per Representative and the number of Representatives per person. See page 10, *supra*. Moreover, as Judge O'Scannlain observed, the equal proportions method also minimizes the total departure from the ideal (nationwide average) district

size. App., *infra*, 29a-30a.[18] Other apportionment methods considered by the NAS committee in 1929 and available to Congress would satisfy still other measures of equity. See pages 9-10, *supra*. The Constitution, however, does not identify any one of those measures of equity as controlling; it instead commits that policy determination to Congress's discretion. Thus, judicial review of Congress's selection from among available apportionment methods that are reasonably tied to the population of the States is barred because of "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion." *Baker* v. *Carr*, 369 U.S. at 217.

c. Contrary to the district court's reasoning, *Westberry* v. *Sanders* does not suggest that the method of equal proportions is unconstitutional. *Wesberry* and its progeny hold that a state legislature, in drawing congressional districts within a State, must achieve the standard of one person, one vote as nearly as practicable. 376 U.S. at 7-8; accord *Karcher*, 462 U.S. at 730-731. But *Wesberry* rests on *Clause 1* of Article I, Section 2, which provides that Representatives shall be chosen "by the People of the several States," 376 U.S. at 7-8, not *Clause 3*, at issue here, which addresses apportionment among the States. Moreover, unlike drawing congressional districts within a State, for which near perfect equality of representation for equal numbers of people is attainable, apportionment of Representatives among the States under *any* available method will inevitably result in differences of several hundred thousand in the size of congressional districts.

[18] Under the equal proportions method, the population of Montana's single district (803,655) is 231,189 persons larger than the ideal district size (572,466), while under the Dean method, Montana would have two districts having a total deviation of 341,276 from the ideal district size. Correspondingly, under the equal proportions method, Washington has nine districts with a total deviation of 264,249 from the ideal district size, while the Dean method would result in a total deviation of 308,216.

Because such differences are intrinsic to the exercise of Congress's plenary power to implement Article I, Section 2, Clause 3, variations in the amounts of those differences under various apportionment formulae do not violate that Clause, so long as the resulting apportionment of Representatives among the States is "according to their respective Numbers."

d. Finally, the district court plainly erred in holding that Congress did not make a "good faith effort" to accomplish an appropriate apportionment because reapportionment under 2 U.S.C. 2a occurs on the basis of calculations by Executive Branch officials in accordance with the statutory formula in 2 U.S.C. 2a. See App., *infra*, 18a-19a. As Judge O'Scannlain observed, there is "no hint" in Article I, Section 2 that "Congress must reexamine every ten years the formula it uses to address the fractional interest problem," and 2 U.S.C. 2a does not in any event prevent such a reexamination. App., *infra*, 32a-34a. Moreover, the existence of a fixed reapportionment formula in 2 U.S.C. 2a serves to eliminate the bitter controversy and self-interested apportionment proposals that inevitably resulted prior to 1941, when Congress enacted an apportionment on an ad hoc basis only after the results of the most recent decennial census were already known. Thus, 2 U.S.C. 2a(a) produces stability and promotes public confidence that representation in the House is determined in a fair and neutral manner and that the perceived advantages and disadvantages to particular States following any one census will, in the long run, even out. Congress reasonably could agree with Justice Story that "the rule [of apportionment] ought to be such, that it shall always work the same way in regard to all the states, and be as little open to cavil, or controversy, or abuse, as possible." 2 J. Story, *Commentaries on the Constitution* § 676 (1833) (quoted in App., *infra*, 26a (O'Scannlain, J., dissenting)).

2. The constitutional question presented by this case is one of paramount importance concerning the structure of

the Government, and it warrants prompt resolution by this Court. The state legislatures, in reliance on the apportionment of Representatives made by 2 U.S.C. 2a, are now in the midst of (or have already completed) the process of redrawing congressional districts for the 1992 elections. The apportionment of Representatives also determines the number of electors to which each State will be entitled in the 1992 Presidential election. U.S. Const., Art. II, § 1, Cl. 2 (each State is entitled to a number of electors equal to the number of Senators and Representatives to which it is entitled); 3 U.S.C. 3 (same). Although the district court's judgment does not actually order a different allocation of Representatives among the States for the next Congress or mandate that the Dean method or any other particular apportionment method be used in place of the method of equal proportions (see note 19, *infra*), it declares the existing method unconstitutional and apparently contemplates that Congress will enact a new law to provide for a different apportionment.[19] The Court should promptly remove this cloud

[19] In addition to declaring 2 U.S.C. 2a unconstitutional, the district court's judgment permanently enjoins the Secretary of Commerce, Director of the Bureau of the Census, and the Clerk of the House of Representatives from "effecting reapportionment of the United States House of Representatives under the provisions of that said statute." App., *infra*, 48a. However, the Secretary, Director, and Clerk have already completed all of the actions required of them by 2 U.S.C. 2a for the current reapportionment, according to the method of equal proportions. The States are now free to conduct elections for the number of Representatives they have been allocated under that method. The injunction against the Secretary, Director, and Clerk therefore has no impact this year.

The Declaratory Judgment Act would permit appellees to seek "[f]urther necessary or proper relief" based on the declaratory judgment "against any adverse party whose rights have been determined by such judgment." 28 U.S.C. 2202. But it is not clear what relief they might seek. Congress has not expressly given the courts any role in apportionment matters, much less authorized a particular form of relief. Cf. *Luther* v. *Borden*, 48 U.S. (7 How.) 1, 42-43 (1849). Moreover, under 2 U.S.C. 2a, the actions of the

over the existing apportionment by setting aside the judgment below.

Furthermore, another challenge to 2 U.S.C. 2a has been brought by the Commonwealth of Massachusetts, which advocates use of the Webster method. That method would result in a transfer of one Representative from Oklahoma to (not surprisingly) Massachusetts, while leaving the allocation to all other States (including Montana and Washington) unaffected. *Massachusetts* v. *Mosbacher*, Civ. No. 91-11234WD (D. Mass.). A three-judge court has been impaneled in that case as well. If the Massachusetts district court adopts the position of *either* party in that case, its judgment will conflict with the judgment of the three-judge court in this case. Prompt review therefore is especially warranted to avoid the possibility of inconsistent judgments regarding the constitutionality of the statutory formula for apportioning Representatives among *all* the States.

3. This Court has jurisdiction to resolve the important constitutional questions presented by this appeal. An appeal to this Court lies from "an order granting or

Secretary, Director, and Clerk are not determinative: the Secretary receives the necessary census data from the Director and then furnishes them to the President pursuant to 13 U.S.C. 141(b), and the Clerk performs the essentially ministerial task of notifying the States of the number of Representatives to which they are entitled under the President's statement. Rather, 2 U.S.C. 2a(b) renders the President's actions determinative, by providing that "[e]ach State shall be entitled * * * to the number of Representatives shown in the [President's] statement [to Congress] required by [2 U.S.C. 2a(a)]." Yet appellees understandably made no effort to join the President as a defendant.

Because the injunction entered by the district court is permanent, it apparently would bar the Secretary, Director, and Clerk from effecting a reapportionment following the *next* census (in the year 2000) according to the method of equal proportions prescribed by 2 U.S.C. 2a. The injunction therefore could be read to bar the Secretary from furnishing the President with tabulations of State populations and performing the necessary calculations under the equal proportions method on his behalf at that time.

denying * * * an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges." 28 U.S.C. 1253. The judgment below grants a permanent injunction and was issued by a three-judge court. Hence, the Court has jurisdiction if a three-judge court was required by Act of Congress.

A three-judge court is required "when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body." 28 U.S.C. 2284(a). A challenge to a *state* statute apportioning Representatives among congressional districts requires the convening of a three-judge district court under 28 U.S.C. 2284(a). *Karcher*, 462 U.S. at 729. The question whether a three-judge district court is also required for a challenge to a *federal* statute apportioning Representatives among the States is one of first impression.[20] But, in our view, such a case likewise is one "challenging the constitutionality of the apportionment of congressional districts" within the meaning of 28 U.S.C. 2284(a).

To be sure, 2 U.S.C. 2a speaks of apportioning "Representatives," not "congressional districts." But for present purposes, there is no difference in substance between those two terms. Within a State, for example, "apportionment of congressional districts" describes both the assignment of state residents to districts and the apportionment of

[20] In *Federation for American Immigration Reform (FAIR)* v. *Klutznick*, 486 F. Supp. 564 (D.D.C.), appeal dismissed, 447 U.S. 916 (1980), the plaintiffs contended that inclusion of illegal aliens in the 1980 census would be unconstitutional. A three-judge district court was convened. Although the district court held that the plaintiffs lacked standing, it also suggested that the case did not fall under Section 2284(a)'s three-judge court requirement. 486 F. Supp. at 577. However, the counting of persons in the States, at issue in *FAIR*, is not itself part of the apportionment of Representatives; it precedes, and is the predicate for, the apportionment. In this case, by contrast, appellees take the respective populations of the States as a given and challenge the actual apportionment of Representatives among the States based on those populations.

that State's Representatives among those districts. Accordingly, a constitutional challenge to the relative size of the congressional districts, as in *Wesberry* or *Karcher*, may be characterized as a challenge to either the apportionment of the congressional districts themselves or to the apportionment of Representatives among the districts. The same is true here. Under 2 U.S.C. 2c, the Representatives to which each State is entitled must be elected from "districts." As a result, 2 U.S.C. 2a directly determines both how many Representatives *and* how many congressional districts a State will have. Moreover, by prescribing the number of congressional districts in any State, 2 U.S.C. 2a also determines the average size of those districts, which in turn plays a central role in apportioning districts within the State. *Karcher*, 462 U.S. at 730-731. For these reasons, appellees are "challenging the constitutionality of the apportionment of congressional districts" for purposes of 28 U.S.C. 2284(a).[21]

[21] The history of 28 U.S.C. 2284(a) supports this conclusion. Prior to 1976, state apportionment cases were often heard by three-judge courts, because 28 U.S.C. 2281 (1970) required such courts where the plaintiff sought to enjoin enforcement of a state statute on constitutional grounds. See, *e.g.*, *Reynolds* v. *Sims*, 377 U.S. 533, 541 n.6 (1964); *Baker* v. *Carr*, 369 U.S. at 188. In 1976, Congress repealed 28 U.S.C. 2281 (1970), along with 28 U.S.C. 2282 (1970), which required a three-judge court if the plaintiff sought to enjoin enforcement of a *federal* statute on constitutional grounds. Pub. L. No. 94-381, §§ 1, 2, 90 Stat. 1119. At the same time, Congress amended 28 U.S.C. 2284(a) to require a three-judge court in cases challenging apportionment of congressional districts or statewide legislative bodies. § 3, 90 Stat. 1119.

The Senate Report on the 1976 amendments states that they "eliminate the requirement for three-judge courts in cases seeking to enjoin the enforcement of State or *Federal laws* on the grounds that they are unconstitutional, *except in reapportionment cases*." S. Rep. No. 204, 94th Cong., 1st Sess. 1-2 (1974) (emphasis added); accord, H.R. Rep. No. 1379, 94th Cong., 2d Sess. 3 (1976). This passage suggests that a three-judge court is required if "Federal laws" governing "reapportionment" are challenged. The Senate Report also states (at 9) that the 1976 revision "preserves" three-judge courts for "cases involving congressional reapportionment or the

Accordingly, as the court below held, a three-judge district court was properly convened in this case. This Court therefore has jurisdiction over the instant appeal under 28 U.S.C. 1253.[22]

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reapportionment of a statewide legislative body." See also H.R. Rep. No. 1379, *supra*, at 6 (emphasis added) (amendments will "*continue* the requirement for a three-judge court in cases challenging the constitutionality of *any* statute apportioning congressional districts or apportioning any statewide legislative body"). Because appellees' challenge to the constitutionality of the Act of Congress governing apportionment of Representatives would have required a three-judge court under 28 U.S.C. 2282 (1970) prior to 1976, the congressional intent expressed in the committee reports to "preserve" and "continue" existing requirements under 28 U.S.C. 2284(a) applies to cases involving challenges to federal as well as state laws governing "congressional reapportionment." So, too, does the Senate Report's observation (at 9) that reapportionment issues "are of such importance that they ought to be heard by a three-judge court."

[22] If the Court disagrees with our position (and that of the district court and appellees) and holds that the three-judge district court was improvidently convened, an appeal from the judgment below lies in the Ninth Circuit. *Board of Regents* v. *New Left Education Project*, 404 U.S. 541, 545 (1972); *Turner* v. *City of Memphis*, 369 U.S. 350, 353 (1962); *Wilentz* v. *Sovereign Camp, Woodmen of the World*, 306 U.S. 573, 582 (1939). Accordingly, in addition to taking this direct appeal, we have, out of an abundance of caution, filed a protective notice of appeal to the Ninth Circuit and docketed the appeal in that court. And to ensure that this Court can render a decision this Term on the important constitutional questions presented even if it concludes that a direct appeal does not lie, we are filing, simultaneously with this jurisdictional statement, a petition for a writ of certiorari before judgment to the Ninth Circuit, pursuant to 28 U.S.C. 1254(1). If this Court should conclude at any stage that it does not have jurisdiction over this appeal, it may grant the certiorari petition in order to render a decision on the merits. See *Turner*, 369 U.S. at 353-354 (granting such a writ after holding that a three-judge court was improperly convened); *Stainback* v. *Mo Hock Ke Lok Po*, 336 U.S. 368, 371 (1949) (same); R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 272-228 & n.78 (6th ed. 1985).

CONCLUSION

The Court should note probable jurisdiction and reverse the judgment of the district court.

Respectfully submitted.

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NOVEMBER 1991

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

CV 91-22-H-CCL

THE STATE OF MONTANA; STAN STEPHENS, Governor of the State of Montana; MARC RACICOT, Attorney General for the State of Montana; MIKE COONEY, Secretary of State for the State of Montana; MAX BAUCUS, United States Senator; CONRAD BURNS, United States Senator; PAT WILLIAMS, United States Representative; and RON MARLENEE, United States Representative, PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF COMMERCE; ROBERT A. MOSBACHER, Secretary of the United States Department of Commerce; BUREAU OF THE CENSUS; BARBARA EVERITT BRYANT, Director of the Bureau of the Census; and DONNALD K. ANDERSON, Clerk of the United States House of Representatives, DEFENDANTS

OPINION AND ORDER

[Filed Oct. 18, 1991]

Lovell, District Judge and
Battin, Senior District Judge:

This matter came on for hearing September 3, 1991, before a three-judge-court composed of United States Circuit Judge Diarmuid F. O'Scannlain, United

States Senior District Judge James F. Battin, and United States District Judge Charles C. Lovell, on cross-motions for summary judgment and also on Defendants' motion to review Judge Lovell's August 15, 1991, order. Plaintiffs were represented by Marc Racicot, Clay Smith, and Elizabeth S. Baker; and Defendants were represented by Susan L. Korytkowski and Mark H. Murphy. Having fully considered the presentations of the parties and the briefs filed in response to these motions, the court now enters its Opinion and Order.

PROCEDURAL HISTORY

Plaintiffs commenced this action on May 22, 1991, by filing their complaint for declaratory and injunctive relief, motions for preliminary injunction and for convening of three-judge-court, and affidavits and briefs in support thereof. After considering Plaintiffs' motion for convening of three-judge-court, Judge Lovell, on May 24, 1991, notified the Chief Judge of the Ninth Circuit Court of Appeals that the matter was appropriate for consideration by a three-judge-court.

A status conference with counsel was conducted on June 24, 1991, and the court set down a schedule for the filing and briefing of potentially dispositive motions. During that conference, the parties agreed that this matter could ultimately be submitted for decision on cross-motions for summary judgment. On July 9, 1991, the parties were notified that the other two judges had been designated and that the court intended to set the motion for preliminary injunction for hearing on September 3, 1991.

After denying Defendants' motions to dismiss Plaintiffs' complaint and to dissolve the three-judge-court,

by order of August 15, 1991, Judge Lovell set a schedule for the filing and briefing of cross-motions for summary judgment and also the motion to review the August 15, 1991, order. Those motions all came on regularly for hearing before the three-judge-court on September 3, 1991.

ARGUMENTS

Plaintiffs seek to prohibit Defendants from effecting a reapportionment of the United States House of Representatives for the 1992 congressional election based on the method prescribed by Title 2, United States code, section 2a. Plaintiffs Stephens, Racicot, and Cooney bring this claim on behalf of all voters of the state of Montana, claiming that the latest apportionment unconstitutionally denies Montana voters equal representation as required by Article I, Section 2 of the Constitution. Plaintiffs Baucus, Burns, Williams, and Marlenee (Congressional Delegation Plaintiffs) claim that the automatic apportionment method deprives them of the opportunity to vote on the decennial apportionment.

Defendants contend that this case is not appropriate for submission to a three-judge-court because it involves apportionment among the states rather than within the states. Defendants also argue that the complaint raises a nonjusticiable political question and that Plaintiffs lack standing to bring either the first or second claims for relief in the complaint. Finally, Defendants argue that even if the court proceeds to the merits of Plaintiffs' claim, the court should find 2 U.S.C. § 2a constitutional. Defendants contend that Congress should not be held to the same exacting standard in apportioning representatives among the states as state legislatures in apportioning

representatives within states. Defendants further argue that the court should approve Congress' choice of an apportionment method so long as Congress had a rational basis for that choice.

REVIEW OF AUGUST 15, 1991, ORDER

Before addressing the merits of Plaintiffs' claims, the three-judge-court initially reviews the order previously entered by Judge Lovell. Defendants seek review of the order denying their motion to dismiss Plaintiffs' complaint. Defendants first raised their justiciability and standing arguments in that motion to dismiss. The motion also requested that the three-judge-court be dissolved, claiming that the issues raised by Plaintiffs are not appropriate for submission to a three-judge-court. The three-judge-court has reviewed the briefs submitted by the parties relating both to Defendants' original motion to dismiss and to Defendants' motion to review the order entered by Judge Lovell, and has considered the arguments raised at the hearing.

A. *Three-Judge Court*

Section 2284 of Title 28, United States Code, provides:

> A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of Congressional districts or the apportionment of any state-wide legislative body.

Plaintiffs filed this action challenging the constitutionality of Congress' apportionment of Congressional districts among the states. Therefore, this matter is appropriate for submission to a three-judge-court.

B. *Political Question*

The three-judge-court has reviewed the formulations traditionally employed to describe nonjusticiable political questions, and has determined that Plaintiffs' claims do not fall within any of those formulations. Plaintiffs' complaint calls upon this court to interpret the constitution and to decide whether the 1990 apportionment of representatives among the states meets the standards established by Article I, Section 2 of the Constitution. Constitutional interpretation is the responsibility of the judiciary, *Baker v. Carr*, 369 U.S. 186, 211 (1962), and this court will not shirk that responsibility.

C. *Standing*

Plaintiffs allege, in the first count of their complaint, that the current apportionment deprives voters in the state of Montana of equal representation in the House of Representatives. This injury to Plaintiffs' voting power can be traced to the use of an allegedly unconstitutional apportionment method, and there is a substantial likelihood that the injury will be redressed if Congress is forced to adopt a constitutional method.

Congressional Delegation Plaintiffs allege, in the second count of their complaint, that the automatic apportionment method deprives them of their opportunity to vote on legislation effecting the decennial census. This injury can be traced to the automatic nature of the current apportionment statute, and there is a substantial likelihood that the injury will be redressed if the court grants Plaintiffs the relief sought and declares the automatic apportionment statute unconstitutional. Plaintiffs have established their standing as to both counts of their complaint.

For the foregoing reasons, the three-judge-court hereby approves and adopts Judge Lovell's August 15, 1991, order denying Defendants' motion to dismiss and to dissolve three-judge-court.

CROSS-MOTIONS FOR SUMMARY JUDGMENT

Summary judgment is properly granted under Rule 56(c), Federal Rules of Civil Procedure, if "the pleadings and supporting materials show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *California Architectural Building Products, Inc. v. Franciscan Ceramics*, 818 F.2d 1466, 1468 (9th Cir. 1987), *cert. denied*, 484 U.S. 1006 (1988). Both parties having agreed that there are no genuine issues of material fact in dispute, the court must now decide the legal issues raised by the parties.

One of the greatest controversies during the Constitutional Convention of 1787 concerned the issue of how representation would be apportioned in the new government's legislative body. 1 *Records of the Federal Convention of 1787* 321 (Farrand ed. 1911) (hereinafter *Farrand*). The more populous states argued that representatives should be apportioned according to population, and the less populous states argued that each state should have equal representation. When the inability to resolve this issue threatened to end the convention without formulating a constitution, Benjamin Franklin proposed what has become known as the "Great Compromise." *Id.* at 488. That compromise resulted in the creation of the two houses which make up this nation's current legislative branch. According to the framers, the House of Representatives would be apportioned on the basis of population and would represent the people, and each state would be represented equally in the Senate which would therefore represent the states. *Id.* at 462. As summed up by William Samuel Johnson of Connecticut,

> [i]n *one* branch the *people*, ought to be represented; in the *other*, the *States*.

Id. (emphasis in original).

It is evident from the record of the debates at the Convention that "when the delegates agreed that the House [of Representatives] should represent 'people' they intended that . . . the number [of Congressional seats] assigned to each State should be determined solely by the number of the State's inhabitants." *Wesberry v. Sanders*, 376 U.S. 1, 13 (1964).

> If the power is not immediately derived from the people, in proportion to their numbers, we may make a paper confederacy, but that will be all.

Id. at 10 (citing *Farrand*, at 472).

Article I, Section 2 of the Constitution, one of the products of the "Great Compromise," provides for the apportionment of representatives to the House of Representatives among the several states "according to their respective [n]umbers." Section 2 also provides for a decennial determination of the number of people in each state, and thus of the number of representatives to which each state is entitled.

The method of apportioning representatives among the states has been a source of continuing controversy. In accordance with the mandate of Article I, Section 2, Congress debated and chose the method to be used for each decennial apportionment until 1920, when Congress failed to enact a reapportionment measure. That failure led Congress to enact a re-

apportionment statute in 1941 which specifies the statistical "method of equal proportions," also known as the "Hill method," as the chosen apportionment formula, and makes the reapportionment process self-executing. 2 U.S.C. § 2a. Congress determined that the apportionment of the seats remaining after the assignment of one seat to each state shall be based on the equal proportions method, 2 U.S.C. § 2a(a), and delegated the function of apportioning House seats to the Secretary of Commerce, who takes the decennial census. 13 U.S.C. § 141(a). Although there has been extensive congressional debate *following* most of the decennial censuses conducted since the adoption of the automatic method in 1941, Congress has not since conducted such inquiry *before* the decennial processes began. Here, the current apportionment was ordered without consideration of its merits by Congress.

In 1990, the Secretary of Commerce conducted the decennial census and notified the President of the results of that census. The President transmitted the results to Congress, and the Clerk of the House of Representatives notified each state of the number of representatives to which its residents were entitled. The state of Montana was notified that it is entitled to one representative in the House of Representatives.[1] That determination led the state of Montana to file the instant suit, challenging the constitutionality of 2 U.S.C. § 2a.

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[1] According to the Census results, Montana has a population of 803,655. Montana was formerly apportioned two representatives. This reapportionment designates one representative for Montana as a single district. Thus, this single representative would represent 803,655 people. This single Congressional district contains the largest number of persons per representative in any district.

No state has heretofore turned to the judicial branch to challenge the method employed by Congress to apportion representatives among the several states. This case therefore raises an issue of first impression. Courts have frequently been faced with challenges to the apportionment of congresssional seats within states. The Supreme Court developed the principle of equal representation for equal numbers of people as the standard for deciding such challenges in *Wesberry v. Sanders*, 376 U.S. 1 (1964). Plaintiffs contend that the apportionment principles announced in *Wesberry* and other cases involving intrastate redistricting apply to Congress' duty to apportion seats among the states. The Defendants, however, contend that *Wesberry* and its progeny, which interpret Article I, § 2 in the context of intrastate redistricting, do not apply to the national apportionment issue. They argue that the "one person, one vote" standard is a mathematical impossibility with respect to the interstate apportionment of seats in the House of Representatives because Congress must adhere to existing state boundaries and each state must have at least one representative. The court agrees with Plaintiffs that there is no principled reason why the standards set forth in *Wesberry* should not apply to the apportionment of representatives by Congress, despite this mathematical impossibility.

Article I, Section 2 provides no textual basis upon which to distinguish the duties of Congress from the duties of the state legislatures in this regard. Article I as a whole concerns the powers and responsibilities of the federal legislative branch, rather than state legislatures. The plain language of Article I, Section 2 specifically refers to apportionment among the several states. Clearly, any duty imposed upon state legislatures by Article I, Section 2 is also imposed upon Congress.

The principles set forth in *Wesberry* apply with equal force to Congress' apportionment of representatives among the several states. The Supreme Court in *Wesberry* construed Article I, Section 2 in light of the history of the debates leading to the "Great Compromise" and determined that "equal representation for equal numbers of people" is the "fundamental goal for the House of Representatives." *Id.* at 17. That debate centered on the issue of how seats should be apportioned to states, not on how state legislatures should draw districts within states. Thus, when James Wilson of Pennsylvania stated that "equal numbers of people ought to have an equal number of representatives . . . ," and representatives "of different districts ought clearly to hold the same proportion to each other, as their respective constituents hold to each other," 1 *Farrand* 180, *quoted in Wesberry*, 376 U.S. at 11, he was referring to apportionment of House seats among the states rather than within the states. *See also Wesberry*, 376 U.S. at 31 (Harlan, J. dissenting) ("[T]he statements approving population-based representation were focused on the problem of how representation should be apportioned among the States in the House of Representatives. The Great Compromise concerned representation *of the States* in the Congress.")

The rationale underlying the *Wesberry* opinion actually has more relevance to the national apportionment issue than to intrastate redistricting. In essence, the Supreme Court simply precluded any state from indirectly violating the national standard of "equal representation for equal numbers of people" through its intrastate redistricting actions, stating that

> It would defeat the principle solemnly embodied in the Great Compromise—equal representation in the House for equal numbers of people—for us to hold that, within the States, legislatures may draw the lines of congressional districts in such a way as to give some voters a greater voice in choosing a Congressman than others.

Wesberry, 376 U.S. at 14. Clearly, the Supreme Court's decision in *Wesberry* with regard to intrastate redistricting was premised upon the notion that the "one person, one vote" standard ultimately governs, both at the national and the state levels. Therefore, Defendants' argument that the principles of *Wesberry* do not apply to congressional apportionment among the states is without merit.[2]

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[2] In fact, in *Federation for American Immigration Reform v. Klutznick*, the court emphasized that while the *mathematical* notion of "one person, one vote" is not strictly applicable to the national issue, the underlying *Constitutional* principle of equal representation for equal numbers of people applies to both national apportionment and to intrastate redistricting. 486 F. Supp. 564, 577 (D.D.C. 1980), As Daniel Webster stated in his address to Congress in 1832,

> The Constitution . . . must be understood, not as enjoining an absolute relative equality, because that would be demanding an impossibility, but as requiring *of Congress* to make the apportionment of Representatives *among the several States* according to their respective numbers, *as near as may be*. That which cannot be done perfectly must be done in a manner as near perfection as can be.

M. Balinski and H. Young, *Fair Representation: Meeting the Ideal of One Man, One Vote*, at 31 (1982) (first and second emphases added, third emphasis in original). Congress itself has recognized that the "one man, one vote" principle set forth in intrastate districting cases has at least some application to national reapportionment decisions. *See The Decennial Population Census and Congressional Apportionment*, H.R. Rep. No. 1314, 91st Cong., 2d Sess., at 5-6 (1970).

Article I, Section 2 imposes upon Congress the same duty to "meet the standard of equal representation for equal numbers of people as nearly as is practicable," *Wells v. Rockefeller*, 394 U.S. 542, 544 (1969), when apportioning Congressional districts that it imposes upon state legislatures.

Population equality between districts is the "preeminent, if not the sole, criterion on which to adjudge constitutionality." *Chapman v. Meier*, 420 U.S. 1, 23 (1975). "That is the high standard of justice and common sense which the Founders set for us." *Wesberry*, 376 U.S. at 18. "Adopting any standard other than population equality . . . would subtly erode the Constitution's ideal of equal representation." *Karcher v. Daggett*, 462 U.S. 725, 731 (1983) (citation omitted).

The "as nearly as is practicable" standard requires that a "good-faith effort [be made] to achieve precise mathematical equality" between districts. *Kirkpatrick v. Preisler*, 394 U.S. 526, 530-31 (1969). Only population variances which "are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown" are tolerated by Article 1, Section 2. *White v. Weiser*, 412 U.S. 783, 790 (1973) (quoting *Kirkpatrick*, 394 U.S. at 531)). In making this determination, the Supreme Court has stated that a "court must consider whether the population differences among districts could have been reduced or eliminated altogether by a good-faith effort to draw districts of equal population." *Karcher*, 462 U.S. at 730. Good faith is lacking when the use of a different apportionment scheme could easily reduce population variances. *Doulin v. White*, 528 F. Supp. 1323, 1329 (E.D. Ark. 1982).

A party challenging the apportionment of Congressional districts bears the burden of demonstrating that the population differences among districts could have been avoided. If the party challenging the apportionment scheme establishes "that the population differences were not the result of a good-faith effort to achieve equality," the burden then shifts to the defendant to prove "that each significant variance between districts was necessary to achieve some legitimate goal." *Karcher*, 462 U.S. at 730-31. "[N]either history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation. Citizens, not history or economic interests, cast votes." *Reynolds v. Sims*, 377 U.S. 533, 579-80 (1964).

Plaintiffs contend that the goal of equal representation for equal numbers of people can only be met by adopting a reapportionment method which results in the smallest absolute difference between the number of persons per representative. Plaintiffs have presented expert testimony that the Dean method, also known as the method of harmonic means, best achieves that goal because it was expressly designed to, and does in fact, calculate reapportionment to result in the smallest *absolute* difference between numbers of persons per representative. (Tiahrt Affidavit at p. 3. *See also* Declaration of Ernst at p. 6.) The Dean method also best accomplishes the goal of creating districts closest to the ideal district size. (Tiahrt Affidavit at p. 5.) The Hill method can never meet the criteria proposed by Plaintiffs, because its express objective is to minimize the *relative* difference between the number of persons

per representative and the relative difference between each person's share of a representative.[3]

The criteria used by Plaintiffs have been used by other courts applying the equal population standard to intrastate apportionment. *Karcher*, 462 U.S. at 728 (variances between the actual districts and the ideal district size and total population difference between largest and smallest districts—range); *Kirkpatrick*, 394 U.S. at 527 (variance between actual districts and ideal); *White*, 412 U.S. at 785 (variances between the largest and smallest district and the ideal district size, average deviation from the ideal district size, and total population difference between largest and smallest districts—range); *Wells*, 394 U.S. at 540-41 (maximum deviation above and below the mean district size). No court has actually used the criteria proposed by Defendants to decide whether a good faith effort has been made to achieve equal representation among congressional districts. More importantly, the criteria proposed by Plaintiffs recognizes that the goal of Article I, Section 2 is equal representation, not relatively equal representation.

Courts traditionally look to variances from the ideal district size to determine whether a district is under or over represented. In determining whether avoidable and unjustified variances exist, the court looks to the entire apportionment plan. The court

[3] By arguing that proportions and percentages are the proper criteria, rather than absolute numbers, Defendants ignore the fact that each number represents a person whose voting rights are potentially impacted by the population disparities. There is "no excuse for ignoring our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives." *Wesberry*, 376 U.S. at 18.

analyzes the disparities between states by comparing the districts in those states to the ideal district, and not to each other.

The ideal district reflects the size of each district if it were possible to truly achieve equal representation for equal numbers of people—the goal mandated by the Constitution. Any difference from the ideal reflects unequal representation. Thus, absolute difference from the ideal district is the proper criterion to use in determining whether Congress has met the goal of equal representation for equal numbers of people. Plaintiffs have met their burden of showing that another recognized and accepted statistical method, besides the Hill method, would more closely meet the constitutional mandate of absolute population equality among districts. The burden therefore shifts to Defendants to demonstrate that the greater disparity under the Hill method is necessary to achieve some legitimate goal.[4]

Defendants attempt to justify the variances in district size under the Hill method, contending that Congress considered and rejected the Dean method[5] in 1941 when it chose the method of equal proportions. However, a review of the House debates prior to the enactment of 2 U.S.C. § 2a discloses that the

[4] The court recognizes that two factors are present in interstate apportionment which mandate differences in district size —the need to maintain state boundaries and to award each state at least one representative. The Dean method complies with those requirements and results in smaller disparities between districts than the Hill method.

[5] The court is not including the Adams method in its discussion, since it results in "quota violations," as recognized by the dissent, and therefore does not appear to be a viable alternative.

Dean method was not given serious consideration by Congress. The debates centered on choosing between the method of major fractions and the method of equal proportions, and there was little or no discussion of other available methods. 87 Cong. Rec. 1071, 1084 (1941). The legislative history does not support Defendants' argument that Congress deliberately chose the Hill method over the Adams and Dean methods since the only choice offered was between Hill and major fractions.

Defendants also contend that Congress determined that relative difference was a better measure of the inequity between district size than absolute population variances. If Congress indeed made that decision it did so without benefit of the Supreme Court's interpretation of Article I, Section 2, since the method of equal proportions was adopted prior to *Wesberry*. Moreover, Congress initially adopted the Hill method in 1941 because it allowed Arkansas to retain its existing congressional seats.[6] Defendants admit that Congress' efforts to deal with reapportionment have been political in nature, involving compromises among the states.[7] Defendants cannot justify the

[6] During the debate one congressional delegate, Mr. Cox, presented the issue for discussion as being "whether Arkansas shall lose a representative and losing one, shall Michigan gain one." 87 Cong. Rec. at 1078.

[7] Defendants actually compare Congress' efforts to select an apportionment method to the exercise the framers undertook —the Great Compromise. This comparison effectively demonstrates the fallacy of Defendants' entire argument. The House of Representatives was the *result* of the Great Compromise— one house to be chosen by the people based on population. The Constitution decrees that one house should be chosen on the basis of population, (persons per representative) and Congress cannot ignore that mandate by choosing a method which considers each person's share of a representative.

population variances based on Congress' past "considerations of practical politics." *Kirkpatrick*, 394 U.S. at 533.

Finally, Defendants argue that considerations of equity and fairness supported the selection of the Hill method in 1941. This position reflects the historical congressional concern with finding a "*mathematically defensible* way to apportion Representatives among the States in compliance with the Constitution." *See The Decennial Population Census and Congressional Apportionment*, H.R. Rep. No. 1314, 91st Cong., 2d Sess., App. B. at 15 (1970) (emphasis added). However, Congressional apportionment is not an issue to be governed by subjective mathematical or equitable concerns; it is strictly a Constitutional matter. Population equality within each district is *the* goal under the Constitution, not *a* goal, as Defendants argue. The Constitution mandates apportionment "among the several States . . . according to their respective Numbers," not "according to their respective Numbers and whatever other considerations Congress or its mathematicians may deem appropriate at any given time."

While it is theoretically possible to establish a justification for failure to comply, as far as is practicable, with the constitutional mandate of absolute population equality among districts, *see e.g.*, *Doulin*, 528 F. Supp. at 1330 (projected population changes might, in some circumstances, be a justification that the Supreme Court would accept), it is difficult, if not impossible, to do so. This narrow construction of the constitutional apportionment mandate prompted one Supreme Court justice to complain "that the Court rejected 'every type of justification that has been—possibly, every one that could be—advanced.'" *Id.* quoting *Kirkpatrick*, 394 U.S. at 537, Fortas, J., con-

curring). The justifications offered by Defendants do not satisfy the stringent criteria applied by the United States Supreme Court.[8]

At any rate, Defendants cannot claim that Congress made a good faith effort to achieve the goal of equal representation for equal numbers of people before instituting the most recent reapportionment of representatives because the reapportionment process was automatic, and Congress, in its role as law and policy maker, had no part in the process. Congress, by enacting 2 U.S.C. § 2a in 1941, did not relieve itself of any further obligation to inquire into the Constitutionality of each apportionment decision.[9] It does not place an undue burden upon Congress to require that, once every decade, it apply various accepted statistical methods to the census results and determine which

[8] Assuming that Congress's selection of the Hill method was rational in 1941, as defendants argue, the court is not bound to uphold its constitutionality today, as applied to the 1990 census. A statute which was once validly enacted and constitutional may be rendered unconstitutional by a change in the facts or circumstances upon which it was based. *See Leary v. United States*, 395 U.S. 6, 38 n. 68 (1969); *United States v. Carolene Products, Co.*, 304 U.S. 144, 153 (1938); *Nashville, C. & S.L. Ry. v. Walters*, 294 U.S. 405, 415 (1935); *Chastleton Corp. v. Sinclair*, 264 U.S. 543, 547 (1924).

In this case, the Supreme Court's ruling in *Wesberry* (interpreting Article I, Section 2) and demographic changes in the United States' population since 1941 constitute sufficient changes in circumstances to call into question the rationality of 2 U.S.C. § 2a today.

[9] This view somewhat overlaps the issues raised by Count II of Plaintiffs' Complaint for Declaratory and Injunctive Relief, concerning the automatic nature of the present apportionment statute. The court believes that Count II may have some merit, but will not address those issues since 2 U.S.C. § 2a has been declared unconstitutional on other grounds.

method best meets the Constitutional mandate for population equality among the districts.

By complacently relying, for over fifty years, on an apportionment method which does not even consider absolute population variances between districts, Congress has ignored the goal of equal representation for equal numbers of people. The court finds that unjustified and avoidable population differences between districts exist under the present apportionment, and

HEREBY ORDERS that Plaintiffs' motion for summary judgment is GRANTED, and Defendants' motion is DENIED as to Count I of Plaintiffs' complaint. Judgment shall enter declaring section 2a of Title 2, United States Code unconstitutional and void, and permanently enjoining Defendants from effecting reapportionment of the House of Representatives under the provisions of that statute. Having decided Count I in favor of Plaintiffs and granted Plaintiffs' request for declaratory and injunctive relief, it is unnecessary for the court to further consider the merits of Count II.

The clerk is directed forthwith to notify counsel of entry of this order.

Dated this 18 day of October, 1991.

/s/ Charles C. Lovell
CHARLES C. LOVELL
United States District Judge

/s/ James F. Battin
JAMES F. BATTIN
United States District Judge

O'SCANNLAIN, Circuit Judge, concurring in part and dissenting in part:

I join in the majority opinion to the extent it holds that the three-judge district court was properly convened, that plaintiffs have standing, and that plaintiffs' claims are justiciable.[1] On the merits, however, I am of the view that plaintiffs have failed to show that Congress' present method for allocating House of Representative seats to the states violates the Constitution, and hence I respectfully dissent from the order granting plaintiffs' motion for summary judgment.

I

The State of Montana, and its governor, attorney general, secretary of state and congressional delegation (the "State"), allege that the equal proportions formula used to allocate House seats among the states violates Article I, Section 2, of the Constitution. In the history of the Republic, Congress has used four different mathematical formulae[2] to apportion House

[1] To the extent, however, that plaintiffs' second claim alleges that the internal organization or processes of Congress have denied the Montana congressional delegation the opportunity to vote on apportionment issues, it is a non-justiciable political question. *See United States v. Munoz-Flores*, 110 S. Ct. 1964, 1970 (1990) (political question "doctrine is designed to restrain the judiciary from inappropriate interference in the business of the other branches of government"); *see also Armstrong v. United States*, 759 F.2d 1378, 1380 (9th Cir. 1985) (matter is justiciable because it "does not require delving into the internal records or workings of Congress").

[2] These are: Jefferson "greatest divisors" (1972-1830); Webster "major fractions" (1840, 1910, and 1930); Hamilton-Vinton "simple rounding" (1850-1900); and Hill "equal proportions" (1941-percent).

of Representatives seats among the states. Bureau of the Census, U.S. Dep't of Commerce, *Counting for Representation: The Census and the Constitution* 3-5 (1990). Following the 1920 census, Congress failed to reapportion House seats among the states. This failure was due in part to a lack of confidence in the population figures presented to Congress by the Census Bureau, but was also due in part to increasing doubts that the then-used "major fractions" formula accurately assigned House seats to states based on population. H. Rep. No. 1314, 91st Cong., 2d Sess. 16-17 (1970).

Hence in 1929, Congress commissioned the National Academy of Sciences (the "NAS") to determine which mathematical formula for allocating House seats among the states would best accomplish such allocation consistent with the constraint that states cannot be assigned fractions of a representative. *See* Report of the Nat'l Academy of Sciences Comm. on Apportionment (1919), *reprinted in* H. Rep. No. 1314, 91st Cong., 2d Sess. 19-21 (1970). The NAS recommended to Congress that it abandon the major fractions formula and adopt the Hill "equal proportions" formula. *Id.* The committee of four prominent mathematicians convened by the NAS to respond to Congress' inquiry studied five allocation formulae, including all of the formulae before the court in this matter. *Id.* The NAS study determined that the Hill formula was not only the least biased as between large states and small, but also led to the least percentage discrepancy in "sizes of congressional districts or . . . numbers of Representatives per person." *Id.*

In 1941, Congress passed into law a requirement that the method of equal proportions, the Hill formula, was to be used to apportion representatives among the

states. *See* 2 U.S.C. § 2a(a). Congress has revisited the issue of allocation methodology several times since 1941. In 1948, Congress commissioned another NAS study, which concurred in the 1929 study, again finding the Hill formula superior. In 1971, a House subcommittee stated that the Hill formula served the objective of keeping "the average number of persons per congressional district . . . as nearly equal as possible among the States," and hence declined to change it. H. Rep. No. 1314, 91st Cong., 2d Sess. 5-6 (1970). In 1981, the House considered a bill that would have replaced the Hill "equal proportions" formula with the Hamilton-Vinton formula, but the bill was never passed. In the latest allocation of House seats, conducted earlier this year and based on the 1990 census figures, the Hill formula was used, as it has been since 1941.

II

The Supreme Court has never set forth the standard for evaluating claims that Congress has misapportioned House seats among the several states. However, as early as *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), voting had been held to be a "fundamental right." *Id.* at 370. More recently, the Court has stated: "Our Constitution leaves no room for classification of people in a way that unnecessarily abridges" the right to vote. *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). A court, therefore, should center its inquiry on the question of whether disparities in voting power are "unnecessary." Heightened scrutiny attends allegations of deprivation of voting rights. *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).

Karcher v. Daniels, 462 U.S. 725 (1983), concerned the mapping of congressional districts within one state and hence is not directly applicable here. Nonetheless, the Court there set forth a burden shifting

scheme that provides a helpful analytic framework for evaluating the claims brought before us. Under this scheme, the plaintiff has the initial burden of showing that population differences exist among districts, and, more important, that such "differences were not the result of a good faith effort to achieve equality" and could have been avoided by use of a different districting plan. *Karcher*, 462 U.S. at 731. If the plaintiff meets that burden, the burden shifts to the defenders of the districting plan: "[T]he State must bear the burden of proving that each significant variance between districts was necessary to achieve some legitimate goal." *Id.*

III

Article I, Section 2, of the Constitution, as amended by Section 2 of the Fourteenth Amendment, requires that "Representatives shall be apportioned among the several States according to their respective numbers." The manifest command of this text is that House seats are to be allocated to the states based on population. It is also the clear implication of this text, however, that House seats may not straddle state lines; seats must be apportioned to a particular state. Moreover, Article I, Section 2, also provides that "each State shall have at Least one Representative." Hence, while population is an important factor in allocating House seats, other constraints affect the allocation. Because the Constitution provides for these additional constraints, Justice Harlan observed that it "is not strictly true" that "in allocating Congressmen the number assigned to each State should be determined *solely* by the number of the State's inhabitants." *Wesberry*, 376 U.S. at 26-27 n.8 (1964) (Harlan, J., dissenting) (emphasis added).

Contemporaneous accounts of the drafting of the Constitution similarly evince the Framers' intent that

the House be apportioned according to population, subject to the constraints inherent in the Constitution's federal structure. One of the great debates at the Constitutional Convention centered on how to allocate seats in the National Legislature. Although each state, regardless of population, had been equally represented in the Continental Congress, many now argued that "equal numbers of people ought to have an equal no. of representatives." 1 *The Records of the Federal Convention of 1787* at 179 (Farrand ed. 1937) (statement of James Wilson of Pennsylvania). This debate culminated in the Great Compromise, which allocated seats to the states on the basis of population in one chamber, and irrespective of population in the other.

James Madison confirmed the Framers' intent that House seats should be allocated by population. He expressed the view that "[i]t is a fundamental principle of the proposed Constitution, that . . . the aggregate number of representatives allotted to the several States[] is to be determined by a federal rule, founded on the aggregate number of inhabitants." *The Federalist*, No. 54 at 368 (Van Doren ed. 1945).

Hence it is clear that the general principle for allocation is that House seats are to be assigned to states based on population. Unlike in the intrastate context, however, this is not the end of the analysis in the interstate context. For the Constitution requires that the general principle of allocation by population be subject to the following constraints: there must be at least one representative per state, and congressional districts cannot cross state lines. These constraints create the so-called fractional interest problem. For instance, when Montana's percentage of the total U.S. population is multiplied by 435, it should receive 1.404

representatives.[3] Since the Constitution does not permit a representative to be shared between two states, Montana cannot have four-tenths of a representative in Congress. It is impossible, therefore, to follow precisely the general principle of apportionment by population.

James Madison's notes of the Constitutional Convention debate show that the Framers were aware that the scheme they were creating would lead to the fractional interest problem: "A State might have one Representative only, that had inhabitants enough for 1½ or more, if fractions could be applied . . . ." 2 *The Records of the Federal Convention of 1787* at 358 (Farrand ed. 1937) (statement of Oliver Elsworth of Connecticut). The Framers, however, did not include in the Constitution a specific mathematical formula to address the fractional interest problem, and the allocation formula to be used became a point of contention between the First Congress and President Washington. *See* Joseph Story, 2 *Commentaries on the Constitution* § 678-79 (1833).

Justice Story addressed the fractional interest problem in his Commentaries on the Constitution. He first noted that "there can be no subdivision of a [representative]; such state must be entitled to an entire representative, and a fraction of a representative is incapable of apportionment." *Id.* at § 676. Yet Justice Story rejected the notion that if the allocation of House seats could not be accomplished strictly proportionate to population, population should be entirely disregarded. Instead, he reasoned:

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[3] This number, the exact, unrounded proportion of representation a state would be entitled to if fractions of representatives could be apportioned, is referred to by statisticians as the state's "quota."

> the truest rule seems to be, that the apportionment ought to be the nearest practical approximation to the terms of the constitution; and the rule ought to be such, that it shall always work the same way in regard to all the states, and be as little open to cavil, or controversy, or abuse, as possible.

Id. Thus, in evaluating the State's claims, this court must be mindful that representation in the House precisely proportionate to population is impossible under the constitutional plan. Because the goal of any apportionment formula is to be a "practical approximation" to a population-based allocation, merely pointing out that the equal proportions formula leads to population disparities is insufficient to condemn it. Rather, it must be shown that lesser population disparities are possible using another formula.

IV

The State alleges that the equal proportions formula used to allocate House seats among the states is unconstitutional under Article I, Section 2, of the Constitution. The initial burden is on the State to show that the population differences under the equal proportions formula are avoidable, and that they result from the lack of a good faith effort by Congress to achieve population equity among districts, subject to the constitutional provisions requiring at least one representative per state and barring congressional districts from straddling state boundaries. In my view, the State has failed to meet that burden.

Although the Supreme Court has indeed had occasion to evaluate *intra*state apportionment plans in cases such as *Wesberry* and *Karcher*, the standard of precise numerical equality announced in those cases

is impossible to apply here. We engage in a fundamentally different inquiry. Although population equity among districts is a guiding principle, because of the constraints imposed by the Constitution it is impossible to have districts that are even approximately equal in size. Indeed, application of any of the apportionment formulae before this court results in congressional district populations varying by hundreds of thousands of people between states. In intrastate apportionment cases, we must ask the relatively straightforward question: do the districts have the same population? This court has the more complex task of evaluating the relative merits of plans which, by necessity, all fall far short of population equality.[4]

Three different formulae for addressing the fractional interest problem are before this court. The currently used Hill "equal proportions" formula rounds upward all fractions that are greater than the geometric mean of the two whole numbers the fraction falls between. The State offers two alternative

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[4] Variance analysis is a less than straightforward inquiry. In testimony before the House Subcommittee on Census and Population in 1980, a former Census Bureau statistician observed that there are at least three ways in which the constitutional command of representation based on population could be translated into a statistical test for allocation formulae: (1) variability from the ideal number of persons per district, (2) variability from the ideal share each person should have of his representative's vote, or (3) variability of nearness to quota. H. Rep. No. 18, 97th Cong., 1st Sess. 58 (1981). Moreover, variability could be measured both as the absolute variance, or as the variance of the mean squared, which is more typically used by statisticians. *Id.* When the statistician evaluated several allocation formulae, no one formula proved best under all of these measures. *Id.*

allocation formulae it contends would reduce population differences among districts. The Adams "smallest divisors" formula rounds all fractions up no matter how small. The Dean "harmonic means" formula rounds fractions upward if the fraction exceeds the harmonic mean of the two whole numbers the fraction falls between. The Adams and Dean formulae, which have in common the fact that their use would result in two House seats being allocated to Montana, are alleged by the State better to serve the constitutional requirement that House seats be allocated by population.

The Adams "smallest divisors" formula, in my view, is clearly inconsistent with the principle that House seats should be allocated to the states by population. Its most obvious defect is that it violates "quota" for four states. That is, it assigns a number of representativts to a state that is neither of the two closest whole numbers to that state's exact, unrounded share of representation. For instance, California's unrounded quota is 52.124; that is, if representatives could be apportioned in fractions, California would be entitled to exactly 52.124 representatives in the next Congress, based on its 1990 census population. Defs.' Ex. 1 at 12 (declaration of Ernst). While there may be room for argument whether California's quota should be rounded down to 52 or up to 53 representatives, surely it could not be plausibly argued that the House was apportioned according to population if California were allocated only 50 House seats. Yet that is exactly the result compelled by adoption of the Adams plan. *Id.* And California is not an isolated case. Using the Adams formula, Illinois, New York, and Ohio would also receive an ap-

portionment of House seats in violation of their quotas, under the 1990 census. *Id.* at 13.

The Hill "equal proportions" formula, by contrast, has never violated quota in the fifty years it has been in use. *Id.* Every state has always been assigned a number of House seats that is one of the two closest whole numbers to its exact quota. I fail to see how the Adams formula could be said to be more consistent than the Hill formula with the command of Article I, Section 2, that House seats be apportioned to the states based on population.

Nor does application of the Dean "harmonic means" formula show that the Hill "equal proportions" formula leads to unnecessary population differences. The result under the Dean formula is relatively easy to compare to that under the Hill formula because the only difference in seat allocation would be that Washington state's ninth House seat would be reassigned and added to Montana. Pls.' Hill Aff. Ex. G at 1. All other House seat assignments would remain the same under both formulae. This switch of one House seat would *increase* the population variance between the only two states affected. Under the current apportionment using the Hill formula, Montana's congressional district is 48.0% larger than Washington's average district. Using the Dean formula, Washington's districts would become 52.1% larger than Montana's.

The majority states that the "absolute difference from the ideal district is the proper criterion to use in determining whether Congress has met the goal of equal representation for equal numbers of people." *Ante* at 19. Yet under this criterion, the Hill "equal proportions" formula also performs better than the Dean "harmonic means" formula. Under the Hill formula, Montana has one district that is 231,189

persons larger than the ideal district size. If the Dean formula were used, Montana would have two districts, each 170,638 persons smaller than the ideal, for a total absolute variance of 341,276 from the ideal district size. Likewise, Washington's absolute population variance would *increase* by shifting from the Hill formula to the Dean formula. Under the Hill formula, Washington has nine districts, each 29,361 persons too small, for a total absolute variance of 264,249, while adopting the Dean formula would create eight districts, each 38,527 persons too large, increasing the total absolute variance to 308,216. Interestingly, Montana apparently argues that it can live with a variance of 341,276 persons under the Dean formula, while it insists that its 231,189 person variance under the Hill formula is clearly unconstitutional.

The State puts great stock in the fact that under one measure, the Dean and Adams formulae do perform better than the Hill formula: both the Dean and Adams formula produce a narrower range between the smallest district and the largest. That is, if one selects the single biggest district and the single smallest district in the country, and compare just those two, the disparity is smaller when using the Dean or Adams formulate than when using the Hill formula.

The analysis cannot be limited, however, to only two of the nation's congressional districts to the exclusion of the other 433. Instead of examining the degree to which just two districts vary from the ideal, a rigorous analysis looks at the variance of every district in the nation. When all 435 districts are considered, the Hill method has the *least absolute population variance* from the ideal district size, compared to either the Dean or Adams methods. Defs.' Ex. 1 at 13 (declaration of Ernst). Moreover, "it can be

shown mathematically that the [Hill] equal proportions method minimizes this variance among all apportionment methods and all sets of populations." *Id.* at 14.

In my view, the majority is mistaken in stating that "[t]he Dean method . . . best accomplishes the goal of creating districts closest to the ideal district size." *Ante* at 17. The State's expert did originally claim that "the Dean method produces the smallest variance or standard deviation." Pls.' Tiahrt Aff. at 5. The Census Bureau's expert, however, has pointed out that the State erred by "fail[ing] to take into account the number of districts in each state" when computing their variance analysis.[5] Defs.' Ex. 1 at 13 (declaration of Ernst). The State has conceded this error. *See* Pls.' Br. in Opp'n to Defs.' Mot. for Summ. J. 2 n.1 ("Plaintiffs do not dispute the factual allegations contained in the Declaration of Lawrence Ernst."). The Census Bureau has persuasively shown that the Hill formula is superior, notwithstanding the State's mistaken belief that the Dean formula produced the

[5] The reason a variance analysis must account for the number of districts per state is not that there could be variance among the districts within a given state. Indeed, Dr. Ernst's calculations assume that districts within a given state will be evenly sized, as required under *Karcher*. Rather, the necessity of accounting for the number of districts per state is illustrated by the following hypothetical: State A has one district which is 100,000 persons larger than the ideal district. State B has fifty districts, each 10,000 persons larger than the ideal. Under the State's incorrect variance analysis using the average variance for each state, State A's average variance of 100,000 persons is greater than State B's average variance of 10,000 persons. When the number of districts in each state is accounted for, however, State B's variance of 500,000 persons (50 × 10,000) is much larger than State A's variance of 100,000 persons (1 × 100,000).

least absolute variance. *See* Defs.' Ex. 1 at 13 (declaration of Ernst).

In sum, neither of the formulae proposed by the State lead to less population variance than the Hill "equal proportions" formula in use for the past fifty years. The State, in my view, has failed to demonstrate that a better formula exists than the one chosen by Congress. Surely when the Hill formula leads to the least population variance from the ideal, among the formulae put before this court, it cannot be said that Congress has failed to make a good faith effort to achieve population equality among congressional districts. *Karcher* requires just such a showing by the State, and therefore I conclude that the State has failed to meet its burden of proof.

V

The State also claims that section 2a of Title 2 of the United States Code is unconstitutional under Article I, Sections 2 and 7, by not allowing legislative consideration of reapportionment. The majority did not reach this claim, but in my view it should be dismised for failing to state a claim upon which relief can be granted.

First, there is no textual support in Article I, Sections 2 or 7, for the proposition that at each census, Congress must reexamine the mathematical formula it uses to allocate House seats.[6] Article I, Section 2, mandates an "actual Enumeration" every ten years, but gives no hint that Congress must reexamine every ten years the formula it uses to address the fractional

[6] Seldom in constitutional jurisprudence does a court encounter a claim, as here, where there is an utter void of case law. We must perforce make direct recourse to the naked text of the Constitution, a daunting prospect indeed.

interest problem. Section 7 merely recites the process which must be followed for a bill to be enacted into law. It is not alleged that section 2a of Title 2 was enacted in violation of Article I, Section 7, and nothing in section 2a interferes with the process set forth in Section 7 for enacting law. Hence, the constitutional basis for the State's second claim is most unclear.

Second, even if the Constitution does require Congress to reexamine the allocation methodology every ten years, nothing about section 2a of Title 2 prevents such a reexamination. As with any federal statute, Congress is always free to pass superseding legislation that expressly or impliedly repeals section 2a. Indeed, on at least three occasions since section 2a was pased in 1941, Congress has reconsidered use of the Hill "equal proportions" formula specified in section 2a. In 1948, Congress commissioned a NAS study on allocational formulae, and in 1971 and 1981, subcommittee hearings were held on whether section 2a should be amended. Moreover, to the extent the Montana congressional delegation is alleging that the action of their House and Senate colleagues has prevented consideration and passage of a replacement to the Hill formula, we lack jurisdiction because such claim presents a non-justiciable political question.

Despite the State's characterization of section 2a as an "automatic" allocation scheme that is somehow beyond congressional control, nothing but a lack of political will prevents Congress from repealing or amending section 2a now or in the future to change the allocation formula. That Congress has chosen for the time being not to amend section 2a of the statute does not violate either sections 2 or 7 of Article I. I would dismiss the State's second claim.

VI

The Framers could have created a system where congressional districts disregarded state boundaries, in the same way intrastate districts are now drawn across county lines or city limits. This would have largely eliminated the fractional interest problem, since without the constraint of staying within state boundaries, the nation could be divided up into 435 districts each of equal population. But although they recognized the fractional interest problem, the Framers persisted in creating a scheme whereby House seats are assigned to states, not directly to groups of 572,466 people (the current ideal district size), because of the sovereign role the states play in our federal system. Under our scheme of federalism the population within congressional districts must inevitably vary from state to state, and as Justice Story instructs us, the best we can seek is "the nearest practical approximation" to the ideal of apportionment exactly proportionate to population. Either of the alternative formulae put forward by the State creates a greater absolute population variance from the ideal district size than the Hill "equal proportions" formula. The State, in my view, has failed to show that the formula mandated by Congress is not "the nearest practical approximation," and hence I would grant defendants' motion for summary judgment.

Dated this 18 day of October, 1991.

/s/ Diarmuid F. O'Scannlain
DIARMUID F. O'SCANNLAIN
United States Circuit Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

CV 91-22-H-CCL

THE STATE OF MONTANA; STAN STEPHENS, Governor of the State of Montana; MARC RACICOT, Attorney General for the State of Montana; MIKE COONEY, Secretary of State for the State of Montana; MAX BAUCUS, United States Senator; CONRAD BURNS, United States Senator; PAT WILLIAMS, United States Representative; and RON MARLENEE, United States Representative, Plaintiffs,

v.

UNITED STATES DEPARTMENT OF COMMERCE; ROBERT A. MOSBACHER, Secretary of the United States Department of Commerce; BUREAU OF THE CENSUS; BARBARA EVERITT BRYANT, Director of the Bureau of the Census; and DONNALD K. ANDERSON, Clerk of the United States House of Representatives, Defendants.

ORDER

[Filed Aug. 15, 1991]

The undersigned by order entered July 8, 1991, indicated that it was the court's intention to set this matter for hearing on September 3, 1991. Now having ruled on the pending motions to dismiss and to dissolve the three-judge court,

IT IS ORDERED that this case is set down for hearing on Plaintiffs' motion for preliminary injunction on Tuesday, September 3, 1991, at 9:30 a.m., in the courtroom of the United States Courthouse, *Helena*, Montana, before the three-judge court comprised of the Honorable Diarmuid F. O'Scannlain, United States Circuit Judge, the Honorable James F. Battin, Senior United States District Judge, and the undersigned.

The court will also hear at that same time and place cross-motions by the parties for summary judgment, should they desire to file same.

Each such motion shall be filed no later than August 20, 1991, and shall be accompanied by a supporting legal memorandum. Each party shall have five days thereafter to reply to the memorandum of the other party.

Any party wishing review by the full court of the undersigned's order denying defendants' motion to dismiss and motion to dissolve the three-judge court may file a request for such review within five days of the date hereof and may support such request by the filing of a legal memorandum, or by incorporating by reference briefs earlier filed herein. Any new matter raised by any filing supporting a request for review of this order may be replied to within five days. In the event any party requests such review, that issue will also be heard by the full court on September 3, 1991.

The clerk is directed forthwith to notify counsel of entry of this order.

Done and dated this 15 day of August, 1991.

/s/ Charles C. Lovell
CHARLES C. LOVELL
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

CV 91-22-H-CCL

THE STATE OF MONTANA; STAN STEPHENS, Governor of the State of Montana; MARC RACICOT, Attorney General for the State of Montana; MIKE COONEY, Secretary of State for the State of Montana; MAX BAUCUS, United States Senator; CONRAD BURNS, United States Senator; PAT WILLIAMS, United States Representative; and RON MARLENEE, United States Representative, Plaintiffs,

v.

UNITED STATES DEPARTMENT OF COMMERCE; ROBERT A. MOSBACHER, Secretary of the United States Department of Commerce; BUREAU OF THE CENSUS; BARBARA EVERITT BRYANT, Director of the Bureau of the Census; and DONNALD K. ANDERSON, Clerk of the United States House of Representatives, Defendants.

ORDER

[Filed Aug. 15, 1991]

Plaintiffs commenced this action on May 22, 1991, by filing their complaint for declaratory and injunctive relief, motions for preliminary injunction and for convening of three-judge-court, and affidavits and briefs in support thereof. After considering Plaintiffs' motion for convening of three-judge-court, the

undersigned, on May 24, 1991, notified the Chief Judge of the Ninth Circuit Court of Appeals, that the matter is appropriate for consideration by a three-judge-court.

On June 10, 1991, the parties stipulated to allow Defendants sixty days from service of the complaint to respond to Plaintiffs' motion for preliminary injunction. Defendants also reserved the right to file potentially dispositive motions prior to the end of the sixty-day period. After reviewing the parties' stipulation, the court set a status conference to enable the court to determine the nature of any potentially dispositive motions and set a schedule for the filing and briefing of such motions.

Shortly thereafter, Executive Branch Defendants [1] filed their motions to dismiss and to dissolve three-judge-court. Those motions have been fully briefed, and the court is now prepared to rule.[2]

BACKGROUND

Plaintiffs seek to prohibit Defendants from effecting a reapportionment of the United States House of Representatives for the 1992 elections based on the method prescribed by Title 2, United States Code, section 2a. Plaintiffs contend that the current apportionment method violates the United States Constitution's guaranty of each citizen's right to an equal

[1] Executive Branch defendants include all named defendants except Donnald K. Anderson, the Clerk of the United States House of Representatives, who has stipulated to be bound by the court's resolution of Plaintiffs' claims.

[2] These motions are appropriate for determination by a single judge because they do not involve determination of an application for an injunction or judgment on the merits. 28 U.S.C. § 2284(c).

voice in choosing a representative in Congress. (U.S. Const. Art. I, § 2.) Congressional Delegation Plaintiffs [3] contend that the automatic process by which reapportionment is currently accomplished deprives them of their right to vote on any reapportionment scheme that will affect the representation of their state's citizens.

ARGUMENTS

Executive Branch Defendants argue that this case is not proper for submission to a three-judge-court because it is not justiciable and therefore the three-judge-court should be dissolved and the complaint dismissed. Executive Branch Defendants contend that the complaint raises a nonjusticiable political question because the power to apportion congressional seats among the states is textually committed to Congress by the constitution and because the legislative branch, rather than the judicial branch, is best able to determine the appropriate formula for apportioning congressional seats among the states. Executive Branch Defendants also argue that Plaintiffs lack standing to bring either the first or second claims for relief in the complaint. Although Executive Branch Defendants state that the three-judge-court statute may not apply to this matter, they choose not to raise that argument.

Plaintiffs respond that the political question doctrine has never prevented courts from deciding the constitutionality of congressional enactments. Plaintiffs contend that they have satisfied all standing requirements. Finally, Plaintiffs argue that the plain language of the three-judge-court statute demon-

[3] Congressional Delegation Plaintiffs are Max Baucus, Conrad Burns, Pat Williams, and Ron Marlenee.

strates that the convening of a three-judge-court is appropriate whenever the constitutionality of congressional apportionment is challenged.

DISCUSSION

A. *Three-Judge-Court Issue*

The undersigned determined that this case presented substantial constitutional issues concerning the reapportionment of congressional districts before granting Plaintiffs' motion to convene a three-judge-court. This is truly a case of first impression, and neither the state-wide apportionment cases cited by Plaintiffs and decided by three-judge-courts, nor the census challenge cases cited by Defendants and decided by single judges, are directly on point. The plain language of the statute indicates that apportionment issues are appropriate for decision by three-judge-courts. The congressional history demonstrates that congressional recognition of the importance of apportionment issues led to the specific mention of such cases in the three-judge-court statute. The importance of the issue raised here is heightened by the fact that this case concerns apportionment of congressional seats among the states, making the convening of a three-judge-court both appropriate and necessary.

B. *Political Question Issue*

The political question doctrine can best be described in terms of the "several formulations" set forth in *Baker v. Carr*, 369 U.S. 186, 217 (1962).[4] Executive

[4] It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Branch Defendants' contention that this matter falls within the first and fourth *Baker* formulations because reapportionment issues are committed to Congress, and the judicial branch cannot interfere in this area without showing disrespect to a coordinate branch of government is without merit.

The court agrees that the Constitution commits to Congress both the right and the responsibility to apportion seats in the House of Representatives among the several states. The issue here is whether Congress, by adopting the formula and method set forth in 2 U.S.C. § 2a, "has chosen a constitutionally permissive means of implementing that power." *INS v. Chadha*, 462 U.S. 919, 940 (1982). Executive Branch Defendants would have this court accept that "every judicial resolution of a constitutional challenge to a congressional enactment" involves a nonjudicial political question, a theory repeatedly rejected by the United States Supreme Court. *United States v. Munoz-Flores*, 109 L. Ed. 2d 384, 394-95 (1990).

Executive Branch Defendants also contend that the second and third *Baker* formulations are implicated

in this matter. According to Executive Branch Defendants, there is no meaningful judicial standard to determine how many congressional representatives should be apportioned to each state in light of the inherent fraction problem, and only Congress is capable of arriving at a solution that will balance the interests of all states.

The judiciary has consistently shown itself capable of developing standards to determine difficult issues and balance competing rights and interests. *See Munoz-Flores*, 109 L.Ed. 2d at 397 ("Surely a judicial system capable of determining when punishment is 'cruel and unusual,' when bail is '[e]xcessive,' when searches are 'unreasonable,' and when congressional action is 'necessary and proper' " is equally capable of developing standards for making other determinations concerning the constitutionality of congressional actions). Courts have successfully applied the judicially created "one person, one vote" standard to statewide apportionment disputes, while recognizing that reapportionment does not lend itself to a precise mathematical formula, *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964), and the United States Supreme Court has determined that the inability to "perceive a likely arithmetic presumption . . . does not compel a conclusion that the claims presented . . . are nonjusticiable." *Davis v. Bandemer*, 478 U.S. 109, 123 (1986).

Finally Executive Branch Defendants argue that the danger of "multifarious pronouncements" concerning the apportionment formula demonstrates the "need for unquestioning adherence" to the decision already made by Congress, and implicates the fifth and sixth *Baker* formulations. Executive Branch Defendants anticipate "multifarious pronouncements" within the judiciary because the potential exists for other states to file similar lawsuits and the joinder of all

states in one action is not feasible. The potential that different courts may issue disparate opinions on this issue does not give rise to the sixth *Baker* formulation, which concerns "multifarious pronouncements by various departments." *Baker*, 369 U.S. at 217.

This case is clearly "political," in the sense that it is fraught with "significant political overtones." *Chadha*, 462 U.S. at 942-43. However, the political question doctrine was not intended to relieve courts of their responsibility to resolve controversies because those controversies carry with them political implications. *See Baker*, 369 U.S. at 217 ("courts cannot reject . . . a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority"). This court will not employ the political question doctrine to avoid resolution of the profound and significant issues presented in this case.

C. *Standing Issues*

To establish standing, each Plaintiff "must allege personal injury fairly traceable to [Defendants'] allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984). In determining the standing issues raised by Defendants, the court accepts the material allegations of the complaint as true, *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise*, 59 U.S.L.W. 4660, 4663 (1991), and construes the complaint in favor of Plaintiffs. *Moore v. United States House of Representatives*, 733 F.2d 946, 950 (D.C. Cir. 1984).

1. *First Claim for Relief*

Executive Branch Defendants contend that the injury threatened by their conduct is to the citizens of

the State of Montana, and not to the state itself. The State of Montana responds that it has a sovereign interest in its number of electoral votes and will suffer an injury when one of those votes is lost. The appointment of electors is a right held "exclusively by the states." *McPherson v. Blacker*, 146 U.S. 1, 35 (1892). Therefore the state has alleged an injury to itself and not merely to its voters. Moreover the individually named plaintiffs are all citizens of Montana and have alleged personal injury to their voting power.

The court is not persuaded that Plaintiffs must satisfy the stringent requirements of the "but-for" causation test advanced by Executive Branch Defendants to demonstrate that the "line of causation between the illegal conduct and the injury" is not so "attenuated" as to prohibit Plaintiffs from bringing their claim. *Allen*, 468 U.S. at 752. At this stage in the proceedings, the court accepts the material allegations of the complaint as true and finds that the allegedly unconstitutional apportionment method is a substantial factor contributing to Plaintiffs' loss of a representative in the House of Representative and in the electoral college.

To determine whether a decision favorable to Plaintiffs is likely to relieve their alleged injury, the court must analyze "whether it has the power to right or to prevent the claimed injury." *Gonzales v. Gorsuch*, 688 F.2d 1263, 1267 (9th Cir. 1982). Executive Branch Defendants assert that Plaintiffs' claims are too speculative to satisfy the redressability component of standing because Congress will ultimately decide the appropriation formula, and the court cannot predict which formula Congress will adopt. Uncertainty as to which party will ultimately prevail is

present in any lawsuit, and does not affect a party's standing to bring its claim. Plaintiffs' first claim for relief is premised on the argument that a constitutional apportionment method is one which results in the least amount of disparity in district size. Plaintiffs have demonstrated a substantial likelihood that adoption of an apportionment method which results in the least amount of disparity in district size will also result in the apportionment of two congressional districts to the State of Montana. Thus a decision favorable to Plaintiffs will likely result in redress of Plaintiffs' injury. Plaintiffs have standing as to their first claim for relief.

2. *Second Claim for Relief*

The only argument raised by Executive Branch Defendants concerning the standing of Congressional Delegation Plaintiffs to bring their second claim for relief concerns the personal injury requirement of standing. Plaintiffs who sue in their capacity as legislators must "allege a concrete injury in fact to a specific legal interest in order to invoke the jurisdiction of the court." *Moore*, 733 F.2d at 951. Legislators "have a plain, direct and adequate interest in maintaining the effectiveness of their votes." *Coleman v. Miller*, 307 U.S. 433, 438 (1939). "Loss of effectiveness in voting" can constitute an injury in fact if there is an injury to a "legally cognizable interest." *Chiles v. Thornburgh*, 865 F.2d 1197, 1205-06 (11th Cir. 1989).

Congressional Delegation Plaintiffs allege that the automatic nature of the current reapportionment method deprives them of the opportunity to debate and vote on an issue which the constitution mandates

must be decided by Congress.[5] Congressional Delegation Plaintiffs have accordingly alleged a specific and discernible injury which is sufficient to confer standing in this action.

In accordance with the foregoing opinion,

IT IS HEREBY ORDERED that Defendants' motion to dismiss and motion to dissolve three-judge-court are DENIED.

Pursuant to 29 U.S.C. § 2284, any order of the undersigned such as this may be reviewed by the full court at any time before final judgment. Any party desiring such review of this order should file a request therefor within five days, in which event oral argument supporting said request will also be heard at the time set down for hearing Plaintiffs' motion for preliminary injunction.

The clerk is directed forthwith to notify counsel of entry of this order.

Done and dated this 15 day of August, 1991.

/s/ Charles C. Lovell
CHARLES C. LOVELL
United States District Judge

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[5] Executive Branch Defendants argue that Congressional Delegation Plaintiffs are not deprived of their right to debate these issues because any member of the legislature could submit this issue to Congress. Although the "doctrine of equitable discretion" allows the court to refuse to entertain suits brought by members of Congress who have an available "in-house" remedy, members of the Court of Appeals for the District of Columbia, which promulgated that doctrine, have expressed concern as to its viability, *Humphrey v. Baker*, 848 F.2d 211, 214 (D.C. Cir. 1988), and this court therefore will not apply the doctrine.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

CV 91-22-H-CCL

THE STATE OF MONTANA; STAN STEPHENS, Governor of the State of Montana; MARC RACICOT, Attorney General for the State of Montana; MIKE COONEY, Secretary of State for the State of Montana; MAX BAUCUS, United States Senator; CONRAD BURNS, United States Senator; PAT WILLIAMS, United States Representative; and RON MARLENEE, United States Representative, PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF COMMERCE; ROBERT A. MOSBACHER, Secretary of the United States Department of Commerce; BUREAU OF THE CENSUS; BARBARA EVERITT BRYANT, Director of the Bureau of the Census; and DONNALD K. ANDERSON, Clerk of the United States House of Representatives, DEFENDANTS

JUDGMENT AND PERMANENT INJUNCTION

[Filed Oct. 18, 1991]

Pursuant to this court's opinion and order of even date,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that 2 U.S.C. § 2a is unconstitutional and

void, and that defendants, and each and all of them, and their agents, are hereby permanently enjoined from effecting reapportionment of the United States House of Representatives under the provisions of that said statute.

The clerk is directed forthwith to notify counsel of entry of this judgment and permanent injunction.

Done and dated this 18 day of October, 1991.

/s/ Charles C. Lovell
CHARLES C. LOVELL
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

Civil Action No. CV-91-22-H-CCL

THE STATE OF MONTANA; STAN STEPHENS, Governor of the State of Montana; MARC RACICOT, Attorney General for the State of Montana; MIKE COONEY, Secretary of State for the State of Montana; MAX BAUCUS, United States Senator; CONRAD BURNS, United States Senator; PAT WILLIAMS, United States Representative; and RON MARLENEE, United States Representative, PLAINTIFFS,

v.

UNITED STATES DEPARTMENT OF COMMERCE; ROBERT A. MOSBACHER, Secretary of the United States Department of Commerce; BUREAU OF THE CENSUS; BARBARA EVERITT BRYANT, Director of the Bureau of the Census; and DONNALD K. ANDERSON, Clerk of the United States House of Representatives, DEFENDANTS.

[Stamped: Filed Oct. 24, 1991]

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that defendants United States Department of Commerce, Robert A. Mosbacher, the Bureau of the Census, and Barbara

Everitt Bryant hereby appeal to the Supreme Court of the United States from both the final Order dated October 18, 1991, granting plaintiffs a permanent injunction in this action and the Judgment also entered on October 18, 1991. This appeal is taken pursuant to 28 U.S.C. § 1253.

Respectfully submitted,

STUART M. GERSON
Assistant Attorney General

DORIS POPPLER
United States Attorney

KRIS A. MCLEAN
Assistant U.S. Attorney

DENNIS G. LINDER
Director,
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/s/ Sandra M. Schraibman
SANDRA M. SCHRAIBMAN

/s/ Susan L. Korytkowski
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APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

Civil Action No. CV-91-22-H-CCL

THE STATE OF MONTANA; STAN STEPHENS, Governor of the State of Montana; MARC RACICOT, Attorney General for the State of Montana; MIKE COONEY, Secretary of State for the State of Montana; MAX BAUCUS, United States Senator; CONRAD BURNS, United States Senator; PAT WILLIAMS, United States Representative; and RON MARLENEE, United States Representative, PLAINTIFFS,

v.

UNITED STATES DEPARTMENT OF COMMERCE; ROBERT A. MOSBACHER, Secretary of the United States Department of Commerce; BUREAU OF THE CENSUS; BARBARA EVERITT BRYANT, Director of the Bureau of the Census; and DONNALD K. ANDERSON, Clerk of the United States House of Representatives, DEFENDANTS.

[Stamped Filed Oct. 24, 1991]

NOTICE OF APPEAL

Notice is hereby given that defendants United States Department of Commerce, Robert A. Mosbacher, the Bureau of the Census, and Barbara Everitt Bryant hereby appeal, pursuant to 28 U.S.C. § 1291, to the United States Court of Appeals for

the Ninth Circuit from the final Judgment and Order in the above-captioned case dated October 18, 1991, of the United States District Court for the District of Montana.

Respectfully submitted,

STUART M. GERSON
Assistant Attorney General

DORIS POPPLER
United States Attorney

KRIS A. MCLEAN
Assistant U.S. Attorney

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Director,
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SANDRA M. SCHRAIBMAN

/s/ Susan L. Korytkowski
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APPENDIX F

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, Section 2, Clauses 1, 2 and 3 of the United States Constitution provide:

> The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.
>
> No person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.
>
> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.[2] The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to

> chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

2. Article I, Section 8, Clause 18 of the United States Constitution provides:

> SECTION 8. The Congress shall have Power
>
> * * * * *
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

3. Sections 2 and 5 of the Fourteenth Amendment of the United States Constitution provide:

> SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall

bear to the whole number of male citizens twenty-one years of age in such State.

* * * * *

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

4. 2 U.S.C. 2a provides:

Reapportionment of Representatives; time and manner; existing decennial census figures as basis; statement by President; duty of clerk

(a) On the first day, or within one week thereafter, of the first regular session of the Eighty-second Congress and of each fifth Congress thereafter, the President shall transmit to the Congress a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the seventeenth and each subsequent decennial census of the population, and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions, no State to receive less than one Member.

(b) Each State shall be entitled, in the Eighty-third Congress and in each Congress thereafter until the taking effect of a reapportionment under this section or subsequent statute, to the number of Representatives shown in the statement required by subsection (a) of this section, no State to receive less than one Member. It shall be the duty of the Clerk of the House of Representatives, within fifteen calendar days after the receipt of such statement, to send to

the executive of each State a certificate of the number of Representatives to which such State is entitled under this section. In case of a vacancy in the office of Clerk, or of his absence or inability to discharge this duty, then such duty shall devolve upon the Sergeant at Arms of the House of Representatives; and in case of vacancies in the offices of both the Clerk and the Sergeant at Arms, or the absence or inability of both to act, such duty shall devolve upon the Doorkeeper of the House of Representatives.

(c) Until a State is redistricted in the manner provided by the law thereof after any apportionment, the Representatives to which such State is entitled under such apportionment shall be elected in the following manner: (1) If there is no change in the number of Representatives, they shall be elected from the districts then prescribed by the law of such State, and if any of them are elected from the State at large they shall continue to be so elected; (2) if there is an increase in the number of Representatives, such additional Representative or Representatives shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State; (3) if there is a decrease in the number of Representatives but the number of districts in such State is equal to such decreased number of Representatives, they shall be elected from the districts then prescribed by the law of such State; (4) if there is a decrease in the number of Representatives but the number of districts in such State is less than such number of Representatives, the number of Representatives by which such number of districts is exceeded shall be elected from the State

at large and the other Representatives from the districts then prescribed by the law of such State; or (5) if there is a decrease in the number of Representatives and the number of districts in such State exceeds such decreased number of Representatives, they shall be elected from the State at large.

5. 13 U.S.C. 141(a) and (b) provide:

Population and other census information

(a) The Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the "decennial census date", in such form and content as he may determine, including the use of sampling procedures and special surveys. In connection with any such census, the Secretary is authorized to obtain such other census information as necessary.

(b) The tabulation of total population by States under subsection (a) of this section as required for the apportionment of Representatives in Congress among the several States shall be completed within 9 months after the census date and reported by the Secretary to the President of the United States.

* * * * *

6. 28 U.S.C. 1253 provides:

Direct appeals from decisions of three-judge courts

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in

any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

7. 28 U.S.C. 2284(a) provides:

Three-judge court; when required; composition; procedure

(a) A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any state-wide legislative body.

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